

The Development of the Constitution

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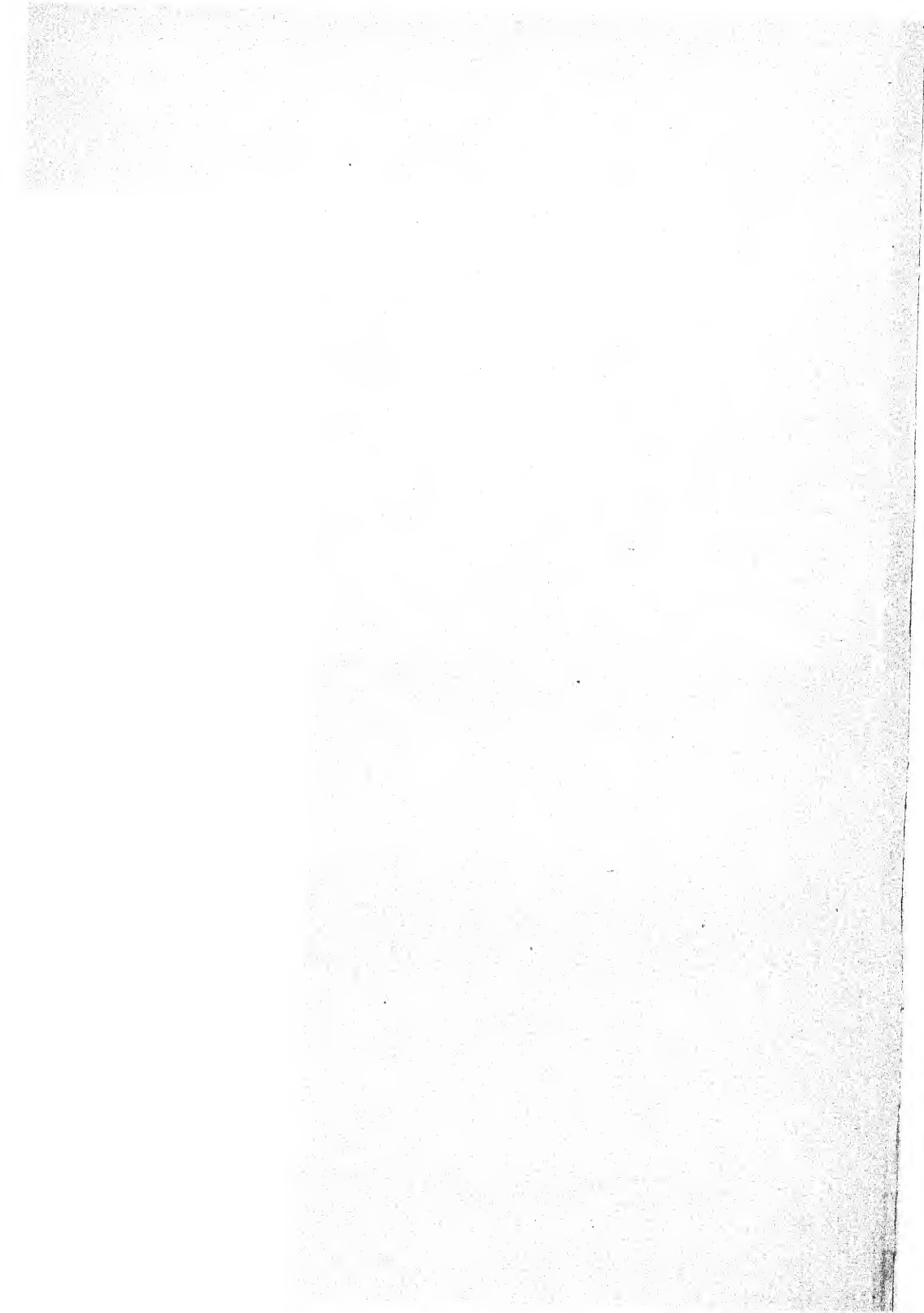
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TO MY WIFE, CAROLINE



Preface

This case book has been planned for students of constitutional law in the colleges, on the theory that their needs and interests are not those of students of the same subject in the schools of law. An undergraduate working in the social sciences is sooner or later intimately concerned with the ways and means of governmental supervision which give social activity its direction and control its conduct. Thus his interest in the judicial power is a part of his interest in the state. His concern with the Supreme Court of the United States is in substance not different from his concern with the legislature or with the problems of administration. The study of the Supreme Court is undertaken as a study of the highest agency of one of the three coördinate branches of the federal government. The Court is analyzed as a quasi-political institution. When the Court is regarded in this way, the nature of the judicial power, the policy-making function of high courts in general and of the federal high court in particular, and the evolution of constitutional jurisprudence, become the subjects of greatest importance.

The source material here presented is made up of the doctrine and the dicta of the judges. A case gives expression to some judicial outlook. The court's opinion is a statement of the point of view from which the court has approached the controversy before it for adjudication. The principles upon which the court's decision rests are thus principles of law, and a decision represents a reasoned exertion of governmental power. A legal principle is binding only while a majority of the court subscribes to it. If a new majority produces a different point of view, then the legal principles which the court will apply must change, too, and past decisions which are not in harmony with the new principles will be either ignored or reversed. Ancient cases over which great constitutional battles have been fought out between opposing groups of judges are, therefore, as vital as recent ones for the development of judicial philosophy. Dissenting opinions may be as important as majority opinions for their influence on subsequent decisions. From an institutional point of view, then, constitutional law is the dominant political philosophy of the supreme bench.

The book opens with an analysis of the Court's conception of the judicial power. Emphasis here is on the establishment by the Court of the power to invalidate legislative enactments, for this power is not only the distinctive feature of the American system of government but also the

means used by the judiciary to control the political branches of government.

The next part of the volume is an exposition of the great concepts of the Constitution. Here is the conceptual material with which the Supreme Court (and therefore all other courts) work; and here the dogmas of the Constitution are to be found. A chapter on the police power of the states has been included in this section because the doctrinal aspects of that power form part of the jurisprudence of the Supreme Court. It is true that the Supreme Court has always maintained that the police power is incapable of precise definition. It is true also that a particular exertion of that power must be tested according to the nature of the federal question raised by the issue. Nevertheless, the doctrine of the police power is a judicial instrument for the allocation of power between the federal and state jurisdictions.

Up to this point, the primary objective has been the isolation and examination of the controlling principles of constitutional law. The cases have been selected for their value in serving this end. Specific clauses of the Constitution have been singled out for detailed study only within this framework. Out of this study the due process clause of the Fourteenth Amendment has emerged with paramount importance. This result has been due not to any system of classification, but to the inner compulsion of judicial thinking.

In the next two sections of the volume, the student turns to a close analysis of two great governmental powers: the taxing power and the power to regulate commerce. The former implements the whole federal system; the latter provides the basis for the national power. A comment, which, indeed, applies to the whole book, may be made on these sections, namely, that the student is led to penetrate deeply rather than to spread himself thinly. The chapter on the police power of the states is placed so as to connect the section on concepts with these two sections, and the internal arrangement of that chapter is planned with the same purpose. In the fields of due process, taxation, and commerce are to be found the essentials of the working constitutional system of the country. On the exercise of the judicial power in these fields, the Court bases its supervision of the policies of government. For these reasons, detail has not been spared in collecting the requisite materials.

At the end is a collection of the great cases of the New Deal, classified for the most part according to political and economic norms under the New Deal's announced objectives, in order to give reality to the juridical problems which confronted the Supreme Court. The cases could have been apportioned to their topical places in the body of the book. If this were done, however, the effects produced by the impact of a crisis in the jurisprudence of the Court would be lost.

So much for the stuff of the collection. Preceding most of the chapters, there are introductions; following a number of the cases, there are notes more or less elaborate—the object being to guide the student through the maze of cases and to orient him within the general design of the text. The introductions and notes are not particularly concerned with stating the rules of law which cluster about a controlling principle. Where they deal with the case materials, they are intended to explain the selection of cases in the chapter; to give each group a certain autonomy; and to create some sense of coherence of doctrine. Where they are devoted to orientation, the attempt is made to link the cases with the life of the nation, on the one hand, and with the conflict of opinion within the Supreme Court, on the other. It is probable that the outlook revealed by them is not as objective as it should be, and that expressions of opinion sometimes are out of place. There should be required of a point of view, however, only that it be reasonable. Lapses other than this one may be tolerated if they produce fruitful opposition.

A generous supply of dissenting opinions has been included with the cases. Some of them have come in the course of time to be adopted as the opinion of the Court. Others have molded later doctrine, even when they have never received acceptance. Others still, because of their earnest frankness, flood with light the motives and reasoning behind the majority opinion. Some are celebrated after the opinion enshrining the decision has been forgotten.

In most of the cases it has seemed serviceable to omit from the record the purely legal data concerning procedural matters. Ordinarily a student in college does not need to care whether a case comes up on *certiorari* or error; nor does it matter from what court. And he can gather for himself from the opinion whether the judgment of the lower court has been confirmed or reversed.

The editor of this book has been profoundly influenced at all points by the teaching and research of Professor Corwin of Princeton University. This indebtedness is now acknowledged with gratitude. The editor has relied heavily, too, upon the writers cited in the bibliographies for their work as pathfinders through the cases; although, in fairness to them, it must be said that the uses to which he has put the cases are of his own devising, to meet the purpose which dominates the book. Charles Warren's famous work, *The Supreme Court in United States History*, has been an indispensable tool; and the editor feels under special obligation to Louis B. Boudin's *Government by Judiciary* for its appraisal of the cases on the judicial veto before *Marbury v. Madison*, and for its emphasis on the political significance of the decisions of the Supreme Court.

So much for the material; one or two practical matters remain. The Table of Contents has been compiled to be a guide or road map for the

student. A reading of the Preface and the Table of Contents together should give him a feeling for the internal logic and coherence of the book. Each part and section of the Table is reproduced at its proper place later on, to aid him to keep his grip on the cases, and each group of cases has its own topical label.

Since the case-form has a marked technical structure of its own, the student will find it serviceable to read the Note which is appended to this Preface.

NOTE ON HOW THE LAW OF THE CONSTITUTION IS DECLARED

The Constitution is interpreted and constitutional law is applied through the medium of litigation, that is to say, through a contest between two parties in a court of law and according to law; the purpose of the contest is to obtain the judicial enforcement of a right claimed by one of the parties. When this litigation is presented to a court for determination, it is called a case, and it becomes not only a contest but also a form of action. A case therefore is the characteristic expression of the judicial power. The utterance of the law is made within this form.

A case is composed of definite elements and is routed through the courts according to definite rules. The rules are laid down partly by the legislature within the jurisdiction of which the court operates, and partly by the court itself. They are outside the scope of the subject at hand because their significance is professional and technical; they are, so to speak, the instrumentalities of legal practice and of the process of adjudication. The elements of a case, however, are of immediate concern, being the matrix of the court's opinion. The court is confined to a decision of the precise issue in controversy and may answer only the question presented to it. If it ventures, as it not infrequently does, to offer general statements on the law, these pronouncements are called *obiter dicta*, and have no authority; they are perhaps called forth by the argument of counsel, but they are not necessary to a decision of the issue before the court.

From these observations it will be apparent that *case* is susceptible of more than one definition. The word will be defined in harmony with the element which is being emphasized. There are, broadly, three types of definition: that in which a case is regarded as a suit or other action at law or in equity; that in which a case is considered as an issue or a question which is being contested before a court; and that in which a case is treated as a factual situation upon which the judicial power can be exerted. For purposes of the present study, a case may be pragmatically defined as a set of facts from which legal consequences flow as a result of judicial action.

A brief analysis of this definition will reveal those elements of a case which a student needs to grasp. Cases are usually known by the names of the parties to the controversy, as, *Roe v. Doe*. The name which comes first is the party which is bringing the action. He is the plaintiff. The other party is the one against whom the action is taken, the one who is called upon to answer, and he is the defendant. The same technical relationship applies, no matter how far up the judicial ladder the case may go. For instance, if Doe loses in the court of first instance, and if he appeals or carries the case to a higher court, then the case becomes *Doe v. Roe*. In like manner, if Roe had been unsuccessful and had carried the case up, the name would have remained unchanged, and the case would still be entitled *Roe v. Doe*. When this procedure occurs, the party which takes the case to a higher court is called the appellant, and the party against whom the action is taken is called either the appellee or the respondent, depending upon the form of the action. Now, Roe may sue Doe for a variety of reasons, or to accomplish one of a multitude of aims. The essence of all of them will be that Roe is attempting to do one of two things: either he is attempting to enforce a right against Doe, or he is seeking to avoid a course of action which Doe would have him pursue. It is important to clear the mind of any conception that Doe is a flagrant wrong-doer against whom Roe is invoking justice. The point is simply that there is a conflict of interest between the two.

It is the function of the statement of facts to show how this clash of interest has arisen. There are at the beginning of a trial actually two sets of statements, one for each side of the controversy. There will obviously be an area of agreement on facts common to both sides; but beyond this group there will be facts peculiar to each side, and to which each party gives controlling weight. The court takes these two statements together with the arguments drawn from them and arrives at a statement of its own. It then draws from its own statement its own argument or opinion. By this means it applies the law in such a way as to resolve the conflict of interest between the parties. For the practiced reader of judicial opinions it is not difficult to forecast the decision from the way in which the court has stated the facts.

The statement of facts has also a second function; i.e., to frame the issue. It is not enough to trace the story of the controversy. The story must be moulded sharply to disclose the exact point of conflict between the parties. It must reveal the question which, when answered, will decide the case. The court has here the same freedom of definition that it has of selection in the choice of facts. Here, too, the manner of definition will shape the argument and point to the decision. The court may state the issue either affirmatively or in the form of a question.

At this point, the court may either state the decision at once and then

proceed to justify it, or it may embark upon an exposition which will gradually disclose the decision in a kind of climax. In either event, the court's argument must have a starting point; it must be grounded somewhere. This anchorage is called variously, the major premise, the controlling principle, or the controlling proposition, in the case. Sometimes it is announced, sometimes it is not; more often, it is not, but rather is to be deduced from the court's reasoning. Nowhere in a judicial opinion is there more difficulty than in this matter of discovering upon what principle the decision rests. No part of the court's argument is more fertile in producing dissenting opinions.

It will be perceived that the foregoing discussion has brought to the word *case* an amplified meaning. The term is now used to denote the whole of a court's opinion; and this is the meaning which the word has in common usage. The case of *Gibbons v. Ogden* means, in effect, the whole statement of the case as presented in the opinion of the court. The elements of the case, then, become those which have been noted: the facts, the issue (with subsidiary questions attached), the principles invoked, the court's argument, and the decision.

It is not possible now to go further than this in the analysis of the structure of cases. The student must practice taking the cases apart for himself.

P. T. F.

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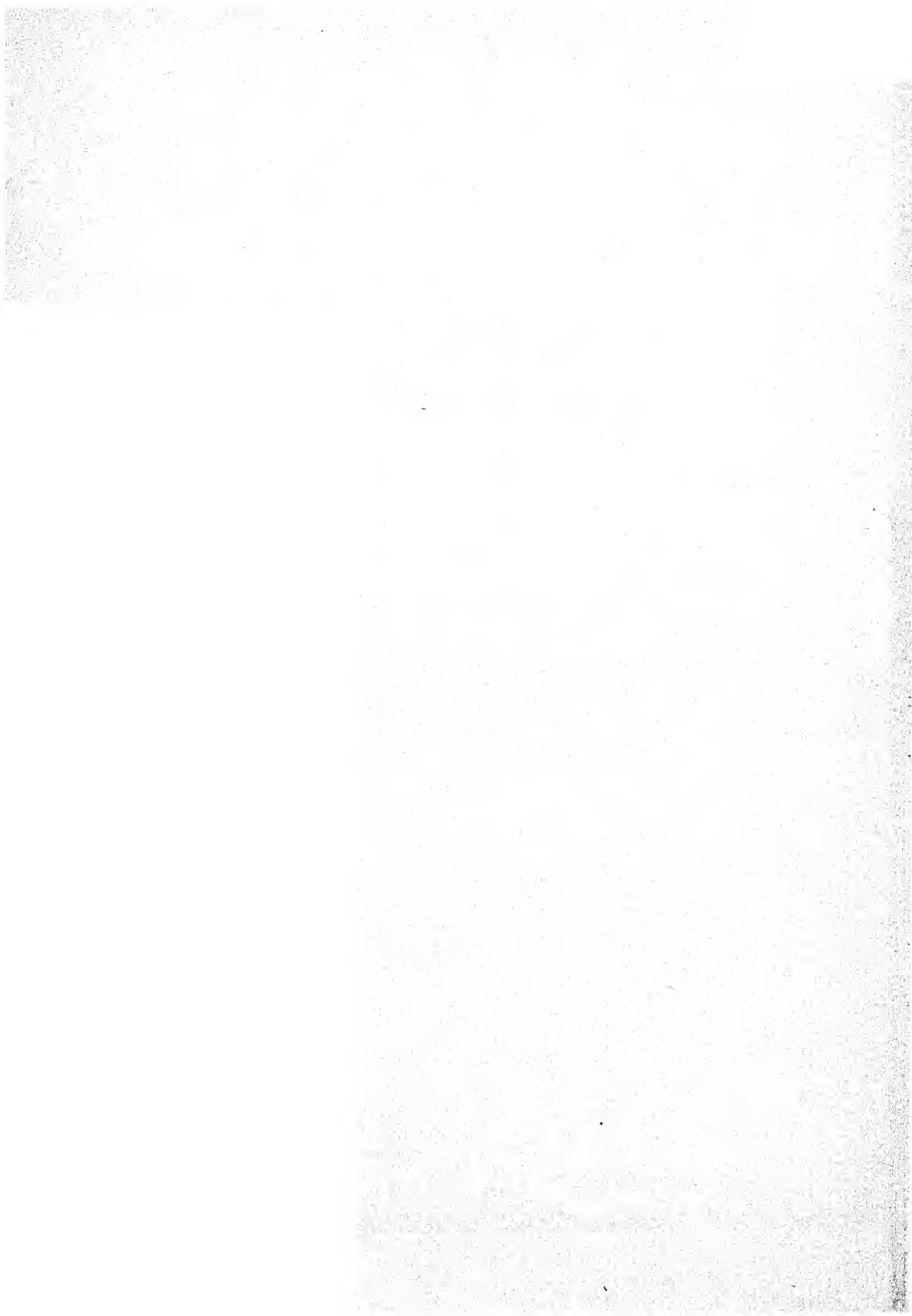
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PART I

The Federal Union



CHAPTER I

The Doctrine of Judicial Review

THE JUDICIAL POWER OF THE UNITED STATES

The Supreme Court of the United States, since it is the court of last resort for the trial of all cases involving a federal question, sums up within itself the judicial power of the United States. The Constitution vests the federal legislative power in a two-chambered body; it vests the executive power in a single individual; and it vests the judicial power in a hierarchy of courts. The Constitution thus purports to create three separate and independent branches of government, each being functionally differentiated from the other two. It will be observed that they are at the same time both independent and constituent—that is to say, that they work both separately from each other and in combination. We are not concerned, however, with exploring the possibilities inherent in this remarkable arrangement. We narrow our interest to the position which the Constitution gives the Supreme Court as a component part of the federal governmental structure.

The dominant characteristic of the American government is that, notwithstanding the theory of coördinate branches, it is based upon the supremacy of the judiciary. The separate existence of the state jurisdictions is alone enough to account for the paramount status of the federal courts, for it is clearly impossible to leave the definition of the powers of the national government to the state judiciaries. This consideration, however, does not explain the superior position which the courts hold within the federal government. The essence of the situation here is that the Constitution is a legal instrument conveying grants of legislative and executive power. It is a part of the judicial function to say what the law is—and that means that the courts must construe the provisions of the Constitution. The process of definition moves throughout the whole federal judicial system until it culminates in a decision by the Supreme Court.

The Constitution is silent as to conceptions of the judicial power. It stipulates, however, that its provisions “and the laws of the United States which shall be made in pursuance thereof; and all treaties made . . . under the authority of the United States, shall be the supreme law of the land”; and this law is made a part of the law of every state in the

Union, and state judges are bound by it. So far, the Constitution is explicit; but at this point it stops. It does not expressly make the judicial construction of its provisions binding upon the other two branches of the federal government; or upon the state governments; or upon the courts of the states. It does not grant to the federal judiciary the power to declare an Act of Congress null and void on the ground of unconstitutionality. Nor does it give this power with respect to the enactments of state legislatures. Such powers are neither granted nor prohibited. Only the matter of jurisdiction receives any specific treatment.

The records of the Philadelphia Convention are non-committal on the subject. It may be that the members considered that the provisions of Articles III and VI were adequate to vest in the federal judiciary the power to invalidate an Act of Congress or an act of a state legislature. It is just as possible that the opinions of the members were divided, so as to permit nothing more than indefinite phraseology. It is also a fair conjecture that the members were not deeply interested, because these points were never made the subject of debate, even though they were noticed on the floor of the convention. Finally, there is nothing in the records which have been preserved in the various journals to preclude the assumption that the convention was minded to let experience work out the reach of the judicial function.

The power to void a law is distinct from the power to interpret the Constitution. It is derived from that power, but is not a necessary consequence of it. The application of a law of admitted constitutionality may involve not only the meaning of the law, but the meaning of the Constitution as well. It is only when a reading of the Constitution invalidates a law that the power to annul comes into play. It does, nevertheless, come into play: the power to veto is latent in the power to interpret. For this reason, discussions of the judicial power were suffused from the beginning with a feeling of political controversy. The judicial veto—to use the popular term—became the central point in the argument. On the theoretical side, the new constitutional system favored the independence of the judiciary. Although the legislatures make the law, the courts apply it. Unless the legislature can control the application of law as well as its content, the judicial branch is limited only by the self-restraint of the judges. Where a constitution places the judicial power beyond the determination of the legislature, the interpretation of the courts becomes final. Legislatures might retire judges who opposed the legislative will, but they could not check the judicial power with which those judges thought themselves invested unless they changed the constitution also. On the practical side, the economic anarchy which prevailed up and down the seaboard, the self-conscious political rivalry which actuated the new states, and the strong growth of an influential opinion bent on

curbing the radicalism of the state legislatures¹ all favored an expansion of responsible judicial power. From the beginning, then, the times were ripe for overt acts by the courts. The concept of the judicial veto as inherent in the judicial function was bound to develop in the minds of the judges.

The doctrine of judicial review was worked out in the state judiciaries during the first half of the nineteenth century, and then taken over into the jurisprudence of the federal Supreme Court. Its idealism is that of the American people.² It is grounded in the conditions of pioneer society. There is present not only distrust but jealousy of political power. That belief in the people which this attitude reflects is the source of societal legislation. There is also a second and complementary element, a belief that men possess certain rights which they can not alienate and which government may not invade. It is the force of these rights which creates freedom. And there is a third element: an ideal of stability based upon an economic order controlled by free competitive conditions.

The courts were inevitably soon confronted with laws which were more than mere regulations of procedure. Government early began to regulate the right of a citizen to use his property as it might please him. Business enterprises grew up which presented problems of organization and control. The movement of commerce across state borders brought into the state jurisdictions the power of the federal government. Many of these new developments produced conflicts of authority to which the state and federal governments were interested parties. Thus the courts discovered that frequently, in deciding a controversy, they were profoundly involved in the very processes of government. They found that in the very act of expounding the law they were enunciating a policy for the political branches of government.

The generalities of the federal Constitution and those of the states provided no more than points from which to start. They were to be interpreted in the light of the body of ideals saturating American life. The courts had also the doctrines of the common law inherited from their English forebears. The common law provided a system into which American ideals and practice might be fitted. That system enshrined a group of customs and usages which were also the articles of faith of the average citizen: the right to pursue one's chosen calling; the right to use and enjoy one's property; the right to undertake an enterprise for the rewards to be extracted from it; the right to bargain freely with one's fellows; the right to governmental protection from disturbance and dis-

¹ For this, see Edward S. Corwin, *The Doctrine of Judicial Review* (Princeton, 1914).

² For this sentence and the substance of this paragraph, I am indebted to Roscoe Pound, "The Ideal Element in American Judicial Decisions," 45 *Harvard Law Rev.*, 147.

order; the right to live, generally, free from governmental supervision; the right of access to the courts for an impartial hearing according to the law of the land. With this equipment the judiciary began its task of interpreting the Constitution.

The courts moved, in short, with the current of the thought of the time. They exerted their power with restraint and invalidated legislation but seldom. Indeed, they faced this question with reluctance, and announced that they would not pronounce a law unconstitutional except in a clear case: the presumption of constitutionality must attach to every legislative enactment. It was with this attitude that the courts met the problems which the new cases brought before them. The attitude of reluctance was well taken because the occasion for the use of the judicial veto proved to be not so simple as Hamilton's argument in the *Federalist*—or that of Marshall in *Marbury v. Madison*—made out. It might be the plain duty of the judicial power to declare void an act which was contrary to the Constitution. The judges, however, found themselves faced with a different question, that is, whether or not such a conflict existed. It was one thing to annul a law self-evidently in violation of the Constitution, but another thing to read unconstitutionality into a law. Thus to taint a legislative act was to go to the edge of the judicial power. Thus, also, was it necessary to find standards by which to test the thrust of governmental power.

The Supreme Court's position exposed it to attacks to which the state courts were not liable. For years it was felt to represent a foreign jurisdiction, and always it was charged with the settlement of controversies arising from a clash of legislative wills. It was the Supreme Court which asserted the national power under the leadership of Chief Justice Marshall. It was again the Supreme Court which restored some of their lost power to the states under the leadership of his successor, Chief Justice Taney. The Supreme Court sustained the broad program of regulatory legislation which the states undertook during the last quarter of the past century. And the Supreme Court terminated that legislation—and with it, the program into which it fitted—in the new years of the present century. It emasculated the national government's anti-trust program by reading into the Sherman Anti-Trust Act words which Congress had not put there, during the years that it supported the states; and it restored the program in the subsequent years with equal facility. It attempted to save the country from civil war by the *Dred Scott* decision, and it halted the reconstruction program of the post-war Congress by its opinion in the *Slaughter-House Cases*. If the people of the United States ordained the Constitution in order to establish a more perfect Union, the Supreme Court, by warrant of the Constitution, allocated the distribution of power within it.

During these first hundred years, the country matured and times changed. The *r public* was now stretching across the continent; the population was increasing at an unusual rate; industrialization had set in after the Civil War with a speed close to headlong; the giant corporation was appearing, with its attendant economic empire; the great banks were moving in to provide capital and to take control of the arteries of business—transportation and production; the people were clustering in tight masses in the industrial cities; labor was organizing and becoming conscious of its potential political influence. During the last quarter of the nineteenth century the process had been too swift to be perceived, too strong to be controlled if it had been perceived, too successful to arouse opposition; so glamorous that it seemed sufficient to provide only for the most pressing readjustments. But even with this limitation, a vast field of regulation in behalf of the public welfare opened up. Government was moved by public opinion to enter it. Laws fixing the hours of labor, minimum wages, and conditions of work; laws prescribing a standard of safety in factories and on railroads; laws fixing the rates to be charged and the services to be provided by common carriers and public utilities; laws regulating the conditions or terms of employment between capital and labor; laws affecting the organization of business; laws directing the conduct of labor unions during strikes; new schemes of taxation involving the structure of corporate enterprise, of capital investment, of earning power, of the value of the property concerned—legislation of diverse character, raising profound constitutional problems, now awaited the sanction of the judicial power. As the Supreme Court disposed of the controversies thus produced, it set the course for government in the fields in which the cases arose. In the performance of its work, it became the supreme legislative body in the nation. Such a work is essentially a function of statecraft, and not elsewhere associated with the judicial power.

As the business of the Supreme Court³ has increased, the Court has reduced the Constitution to case-law. It has been applying the provisions of the Constitution, step by step and point by point, to carefully defined situations of fact. As each point has been decided, the decision has become authority to be followed in subsequent cases where like issues have been in controversy. Thus a body of precedents has been built up by which the law is presumed to be settled. The value of such a system lies in its stability, but there is also in it the risk—almost the certainty—of rigidity. In addition, there is the likelihood that an error once embodied in a decision may be perpetuated by authority. The Supreme Court has been aware of these pitfalls and has consistently refused to permit the

³ This phrase is the title of a book published in 1927 by Felix Frankfurter and James M. Landis.

weight of its precedents to crush its judgment.⁴ Its outlook has varied with changes in time and membership.

One last reflection is perhaps worth attention here. It is this: Throughout its history, the Supreme Court has been in the grip of some doctrinal struggle. It should never be forgotten that before the Court speaks, it votes. Unless the decision be unanimous, the Court is left divided—always into two groups and sometimes into more. The process of adjudication invites and perpetuates cleavage of opinion. At the start, a difference appeared between those who accented the reserved powers of the states and those who were bent on developing the nascent power of the new national (or federal) government. This conflict was fought out in the cases which arose under the commerce clause. A difference of another sort divided those who would maintain a theoretical barrier to governmental supervision and those who felt no such inhibition. Disagreement here was threshed out in the interpretation of due process, and in the field of civil liberties. Controversy of a third type underlay the arguments of strict constructionists of the Constitution and their latitudinarian brethren. As the states became adjusted to acceptance of the new federal government—and this entailed acceptance also of the rôle of the Supreme Court—some of the old problems passed away and the static terms of the Constitution were adapted to meanings suitable to changed conditions. But the Constitution and the cases remained. The conflict between principles rooted in tradition and new philosophy born of immediate pressures proved enduring. Furthermore, as Congress drew on its repertory of powers to attain objectives not hitherto considered as within the sphere of governmental interest, new problems of the gravest sort confronted the Supreme Court and produced deep divisions.

Sooner or later, one is forced to meet the adjectives "conservative" and "liberal." Neither one is susceptible of exact definition, but there is a recognizable distinction between them. By common consent, those who would enforce the time-honored principles of the Fathers have been called conservative, and those who have favored experimental legislation have been called liberal. Those who have relied on the letter of the Constitution have been called conservative, while those who have relied upon dominant public opinion have been called liberal. Those who, on the whole, have been suspicious of social legislation have been called conservative, and those who have welcomed it have been called liberal. Beyond these broad sweeps, however, it is not safe to venture—if, indeed, it is safe to go even thus far. In the last century, for example, it was liberal to erect private rights as a barrier to government, while in the present century it is of the essence of conservatism to do so. The Supreme

⁴ For the cases, see Malcolm F. Sharp, "Movement in Supreme Court Adjudication," 46 *Harvard Law Rev.*, 361, 593, 795.

Court has found itself caught more than once between such fundamental shifts of opinion. When one turns to the Court's own attitude towards its work, one finds that it is liberal to accept the legislative judgment, and conservative to insist upon independent judicial scrutiny. It is liberal to withhold the judicial veto, conservative to exercise it. The presumption of constitutionality which is supposed to attach to a legislative enactment is more likely to be honored by a liberal than by a conservative. Conservatives generally have more respect for the precedents than liberals, and they will cling to a line of decisions where their liberal brethren swing away. A liberal will advocate a reversal of a decision which stands in the way, whereas a conservative, faced with the same obstruction, will make a distinction which will save the case and yet permit the antagonistic decision. Once more, these generalizations reach the limit of prudence if they do not, indeed pass it. A liberal justice, for instance, may share with his conservative colleagues a belief in the efficacy of private competitive enterprise, and yet support legislation introducing governmental control. Conservatives and liberals alike may join in making a certain decision, and yet do so for different reasons. It is even possible to be liberal in one field, as in labor legislation, and conservative in another, as in the field of civil liberties.

The second phase of the growth of the judicial power falls between the years 1890 and 1937. It was in this period that the Supreme Court had its Golden Age. During the two decades from 1890 to 1910, the Court announced and developed the Rule of Reason. In other words, the Court made it a rule to take judicial cognizance of the reasonableness of contested legislation. It erected reasonableness into a test of constitutionality. The new doctrine precipitated a constitutional battle the effects of which are only now being quieted. The course of the struggle can be followed through the series of great minority opinions which the dissent produced during these years. The area of disagreement was pivoted on two questions: Whose reasonableness is to prevail? and, By what standards is reasonableness to be measured? The answer to the first question involved a choice between the legislative judgment or will, on the one hand, and the opinion of a majority of the Supreme Court, on the other. The very nature of the judicial function was under scrutiny, for the application of judicial standards meant, in practice, the substitution of the Court's judgment for that of the legislature. The answer to the second question involved a nice choice between the relative importance of theory and fact, between legal principles on the one hand and a concrete situation on the other. On the one hand was the position that a need, no matter how pressing, is not a source of constitutionality; that if the Constitution is inadequate to cover the need, then the remedy is to amend the Constitution. The Constitution, in other words, means what it

says; and what it says is to be found in the precedents. On the other hand was the position that if the end be legitimate, then the means to that end are legitimate also. Necessity is not, of course, a grant of power; but it may call into play existing power. The Court must take judicial cognizance not only of philosophy, but of reality. It is not arguable that government is helpless in the face of urgent need. These two positions do not meet one another squarely. Neither side ever succeeded in vanquishing the other on the field of logic.

It is bootless to inquire whether the adoption of the Rule of Reason was a conservative or liberal step. It was essentially an evolutionary one, the result of the growth of the judicial power as vested in the Supreme Court. It was partly a functional development and partly a result of the Court's jealousy in behalf of its own power. Like the other branches of the government, the Court is an institution.

The present period in the Court's history may be described correctly as one of revision and amendment. Emphasis is on the judicial support of prevailing public opinion. The issues which confront the Court today rarely turn on questions of substantive power. Where they do, they have come up from the state jurisdictions. The members of the Court are showing themselves intensely individualistic. Never in the Court's history has there been such a plethora of separate opinions. Not since Lincoln's day have the qualities of a statesman been thought so important to a judge.

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There is a group of scholars who hold that the framers of the Constitution meant to vest, and did vest, the judicial power of the United States with authority to annul Acts of Congress, acts of the state legislatures, and decisions of the highest state courts. They have sought to show that this power was both recognized and exerted by English and American courts from time immemorial. Stated in moderate terms, their position sums up to the following propositions:

1. The subordination of acts of Parliament to a higher law was known to English jurisprudence, because Sir Edward Coke said in *Dr. Bonham's Case* in 1610 that an act of Parliament contrary to the common law was void, or, at least, sometimes void.

2. The Privy Council had the power to review judicially the acts of colonial legislatures and to annul them.

3. James Otis, counsel in *Paxton's Case* in 1761, invoked a higher law—either divine law or the law of nature—to argue that it voided a legislative act made contrary to it.

4. Eight precedents are alleged for the exercise of this power by state courts against state legislatures before 1787.

5. The leading members of the constitutional convention knew of this power, advocated the grant of it, and thought they had granted it.

6. Between 1789 and 1803 (the date of the federal Supreme Court's first use of it against Congress), ten state courts exerted this power against their legislatures.

7. During this period, certain members of the Supreme Court claimed the power for the federal judiciary and used it on circuit.

The leading work of this group, in point both of time and authority, is Brinton Coxe, *Judicial Power and Unconstitutional Legislation* (Philadelphia, 1893). Coupled with him should be his friend and follower, W. M. Meigs, "The Relation of the Judiciary to the Constitution," 19 *Amer. Law Rev.* 175 (1885) and his book of the same title published in New York in 1919. Both men are careful critics; both reject *Rutgers v. Waddington* and *Holmes v. Walton*; both hold *Trevett v. Weeden* to be the first well authenticated case. Coxe holds that the power in question was expressly delegated; Meigs, that it was implied. Charles A. Beard, *The Supreme Court and the Constitution* (New York, 1912), moves behind the text of the Constitution to the intentions of its framers. He often uses shrewd guesswork to line up his men. Frank E. Melvin, "The Judicial Bulwark of the Constitution," 8 *Amer. Pol. Sci. Rev.* 167 (1914), supports Beard and gives a summary of the researches made up to date of publication. The well-known works of Farrand (*The Framing of the Constitution*) and Warren (*The Making of the Constitution*) conclude the list as standard general treatments of the constitutional convention. Charles Grove Haines, *The American Doctrine of Judicial Supremacy* (2nd ed., Berkeley, Calif., 1932), is a full summary of the materials in the field indicated, but is nearly devoid of critical appraisal. The traditional precedents are all listed without casting any doubts upon the evidence which supports them, although a few dissident scholars are mentioned in footnotes.

Opposed to this group is another which has for its objective an assault upon the power of the judicial veto. It has had to answer the work of the conservative group, and therefore has concentrated upon the intentions of the framers and upon the early cases. The findings of this group sum up as follows:

1. Coke's dictum in the *Bonham Case* is contradicted by the whole theory and practice of parliamentary sovereignty.

2. The Privy Council's power of review is of slight importance because (a) its position in relationship to a colonial legislature had no similarity either in fact or law to the position of a judiciary fixed as the third coordinate branch of an independent government; and because, further, (b) there is no record of the annulment of an important colonial law, if, indeed, it can be properly said that the Privy Council ever vetoed such a law.

3. There is not one example of a colonial court exercising this power against an act of a colonial legislature.

4. The alleged precedents for the exertion of this power by state courts are in most cases either unreliable or irrelevant for these reasons:

a. For one "case" there is no record at all.

b. For two of them, the opinions were written years after the case was decided, and by a friend of the court.

c. Several are of doubtful authenticity (the number varies with the writer).

d. In most of them, the words claiming the power are mere dicta—the personal opinion of the judge, and not a ruling of the court—because the issue of constitutionality was not necessary for a decision of the controversy.

5. The members of the constitutional convention never directly raised the question of the grant of such a power to the judiciary.

6. The cases between 1787 and 1803 in which an act was voided did not occur before 1787.

7. Chief Justice Marshall does not cite a single precedent for annulling a legislative act in *Marbury v. Madison*, which shows that he either did not know of any or did not think any important.

8. Strong popular disapproval habitually attended the claim to exercise the judicial veto.

Edward S. Corwin, *The Doctrine of Judicial Review* (Princeton, 1914), analyzes Beard's list of the framers and reduces it by about two-thirds. There seems to be no escape from Corwin's estimate. Even more critical of the list is H. A. Davis, *The Judicial Veto* (New York, 1914), pp. 47-69, and "Annulment of Legislation by the Supreme Court," 7 *Amer. Pol. Sci. Rev.* 541 (1913). McLaughlin, *The Courts, the Constitution, and Parties* (Chicago, 1912), is critical of both the list of framers and the list of precedents and regards the judicial veto as the product of an evolutionary development. Herein he agrees with Corwin, who, in the book cited, lists the precedents with careful comments and rejects a number of them, and announces the theory that the judges were induced to claim the power by the necessity of curbing the state legislatures. The most extreme critic in this group is Louis B. Boudin, in his *Government by Judiciary* (2 vols., New York, 1932). He is indispensable in spite of his passionate attack on the traditionalists. His analysis of the early cases appears also in 26 *Pol. Sci. Quar.* 238 (1911). This group may be closed with William Trickett, "Judicial Dispensation from Congressional Legislation," 41 *Amer. Law Rev.* 65 (1907), which launches a general attack all along the line.

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NOTE ON INSTANCES OF JUDICIAL REVIEW BEFORE *MARBURY V. MADISON*

i.

Rutgers v. Waddington, *Trevett v. Weeden*, and *Bayard v. Singleton* arose in the several state jurisdictions of New York, Rhode Island, and North Carolina while the Articles of Confederation were in force.⁵ They present simple issues born directly of the post-revolutionary situation in the country as a whole. Concern here is with their bearing on judicial independence of legislative enactments. The question is phrased so narrowly because that was the way in which it appeared to the legislatures and courts when the controversy over the extent of the judicial power began to make itself felt in the states. From the point of view of the legislatures, it was the plain duty of the courts to enforce statutes in the form in which the courts received them. This idea of the judicial function conceived of the courts as dependent on the legislative will. The doctrine of the separation of powers was not necessarily in contradiction to such a view because separation and independence are two different things. The courts, on the other hand, naturally approached the problem from their own angle. To make a long story short, they would not agree that they might read a statute but not the constitution which

⁵ The citations of these cases are, respectively: Mayor's Court, City of New York, August 27, 1784; Superior Court of Judicature of Rhode Island, 1786; Court of Conference of North Carolina, 1787, reported as 1 Martin, N.C. 42. Thayer, in his edition of these cases, appends the following notation to the *Bayard* case: "This seems to have been the name of the highest court in the State, before 1805. But the name is not given in Martin's Reports. See 4 *Green Bag*, 457." See Thayer, *Cases on Constitutional Law* (2 vols., Cambridge, 1895), Vol. I, at pp. 63, 73, 78.

authorized the statute. If the doctrine of the separation of powers meant anything, it must mean that the legislative reading of the constitution was not binding on the courts.

As is so often the case with historic controversies, more was involved than an argument on the merits of the contentions of the two sides. What was at stake here was nothing less than the control of legislative policy. If the judicial function included the measuring of a statute against the paramount law for the purpose of testing the validity of the legislative enactment, then the judicial interpretation of both must prevail over the legislative will.

The judiciary does not seem to have wished for such a conclusion. The judges did not press their argument so far, in the beginning. On the contrary, they more than once announced that they would not pronounce a law void except in a case where its validity was beyond reasonable doubt.

This position, conciliatory and justifiable though it was, could not appease either the legislators or their supporters. In the first place, it established judicial review as inherent in the judicial function. In the second place, it left the existence of reasonable doubt to the determination of the judges. And in the third place, if it were clear that the questioned statute obviously was unconstitutional, the decision of a court not to enforce it would expose the legislature to the charge of knowingly violating its duty. Besides these immediately practical considerations, there was a fourth one, i.e. that the courts might gradually develop their conception of the scope of judicial review to a point where they would substitute their reading of a statute for that which the legislature intended; or where they would find that the judicial conception of policy, and not the legislative judgment, determined the constitutionality of legislation.

One other aspect of the rise of the controversy should be noted here. The American system of government was congenial to the broadest interpretation of the judicial power. It was so for two reasons. Neither by itself might have been sufficient to incorporate the judicial veto into the judicial function, but together they made it inevitable. The first of these reasons was that the republic was a federation. The effect of this organization was that for each state there was a governing body outside the borders of the state, not owing allegiance to it, and not bound by acts of the state legislature. Under the Articles, this central government possessed no law-making power and no judiciary. Nevertheless it had power to make treaties which were binding on the federation as a unit. These treaties had to be construed and applied. A conflict between a state statute and a provision of a treaty presented justiciable action. Under the Constitution, the situation, was, of course, materially sharp-

ened, because the federal government was endowed not only with the law-making power but with its own judiciary. The second of the two reasons was that the separation of the structure of government into three coördinate branches gave independence to the judicial function. The executive and the judiciary were not servants of the legislature and were not dependent on the legislature either for their terms of office or for their inherent powers. They were the legal equals of each other in every constitutional sense, and equal separately to the law-making branch. The doctrine of the separation of powers was not applied in its fullness until the Constitution was framed. It was practiced in the state governments under the Articles, however, and its implications were familiar to the times. Such a division of powers encouraged each branch at times to assert itself and its prerogatives at the expense of the other two.

ii

The launching of the Constitution of 1787 intensified the discussion of the mooted question of judicial review. The high court of South Carolina, holding that slaves brought into the state, but not with the intention of selling them, were not imported in violation of the state's non-importation act, went out of its way to say: "It is clear that statutes passed against the plain and obvious principles of common right, and common reason, are absolutely null and void, so far as they are calculated to operate against those principles." The court was not, it would seem, referring to some general theory but to a sensible construction of the statute before it. The opinion goes on to say: "In the present instance, we have an act before us, which, were the strict letter of it applied to the case of the present claimants, would be evidently against common reason. But we would not do the legislature who passed this act, so much injustice. . . . We are, therefore, bound to give such a construction . . . as will be consistent with justice, and the dictates of natural reason, though contrary to the strict letter of the law. . . ." The court was, in other words, under obligation to sustain the law if it were possible. To do so, it followed the intention of the law-makers in preference to the statute's phraseology. *Ham v. M'Claws*, 1 Bay 93 (1789).

Three years later, the new federal circuit courts were caught up in the controversy, and registered their opinion of the scope of the judicial power. Congress had passed an act providing for the relief of certain pensioners. (1 U.S. St. at Large 243; March 23, 1792.) One of the beneficiaries, William Hayburn, applied for a *mandamus* to be directed to the Circuit Court for the District of Pennsylvania to compel that tribunal to proceed with his petition for placement on the pension list of the United States. The case did not receive a hearing, because the court

postponed the action until the next term; meanwhile, Congress passed an act providing for the relief of pensioners in a different way. The incident, however, seemed so important to the Circuit Court that the judges addressed a letter to President Washington in which they expressed their views on the constitutionality of the act of 1792. They said bluntly that the court could not proceed under the act. They felt that the "business directed by this act is not of a judicial nature"; that it violated the independence of the judiciary; and that it therefore violated the Constitution of the United States. This court was made up of Wilson and Blair, justices of the federal Supreme Court, and Peters, District judge.

The Circuit Court for the District of North Carolina also wrote to the President, making the same objections. The court was composed of Mr. Justice Iredell of the Supreme Court and Sitgreaves, District judge. The Circuit Court for the District of New York wrote to the same effect. Here the membership consisted of Jay, Chief Justice of the Supreme Court, Mr. Justice Cushing and Judge Duane. These three letters put the individual members of the federal Supreme Court on record against an act, although the Court itself had expressed no opinion. *Hayburn's Case*, 2 Dallas 409 (1792).

In 1795, a case came before the Circuit Court for Pennsylvania in which the court had occasion to settle the title to property in dispute between citizens of Pennsylvania and Connecticut. The controversy turned on the constitutionality of an act of the legislature of Pennsylvania, under that state's constitution. The court's charge to the jury by Mr. Justice Paterson of the federal Supreme Court has become part of the literature of the doctrine of judicial review. Certain passages from it should be quoted here:

What is a constitution? It is a form of government, delineated by the mighty hand of the people, in which certain first principles of fundamental laws are established. The Constitution is certain and fixed; it contains the permanent will of the people, and is the supreme law of the land; it is paramount to the power of the legislature, and can be revoked or altered only by the authority that made it. . . . What are legislatures? Creatures of the Constitution; they owe their existence to the Constitution: they derive their powers from the Constitution: it is their commission; And, therefore, all their acts must be conformable to it, or else they will be void. . . .

. . . . I take it to be a clear position, that if a legislative Act oppugns a constitutional principle, the former must give way, and be rejected on the score of repugnance. I hold it to be a position equally clear and sound, that, in such a case, it will be the duty of the court to adhere to the Constitution, and to declare the Act null and void. . . .

The Constitution expressly declares, that the right of acquiring, possessing, and protecting property is natural, inherent, and unalienable. It is a right not *ex gratia* from the legislature, but *ex debito* from the Constitution. . . . It is

infinitely wiser and safer to risk some possible mischiefs, than to vest in the legislature so unnecessary, dangerous, and enormous power as that which has been exercised on the present occasion; . . . for the legislature judged of the necessity of the case, and also of the nature and value of the equivalent. . . .

Vanhorne's Lessee v. Dorrance, 2 Dallas 304; *passim*.

The case makes but an ambiguous precedent for the judicial veto, in spite of the force of the above statement. Having charged the jury that the act before it is unconstitutional, the court proceeds to consider the situation if the act *is* constitutional. Whether the point of constitutionality needed consideration at all becomes doubtful, because it appears that the conditions laid down by the act had not been performed, and because, anyway, the act had first been suspended and then repealed.

A provision of the federal Constitution was invoked for the first time against a state statute in the case of *Calder v. Bull*, 3 Dallas 386 (1798). The legislature of Connecticut had set aside the decree of a probate court and had granted a new trial with right of appeal. The question was whether this act was an *ex post facto* law within the meaning of I. 10 1 of the federal Constitution. The Supreme Court decided unanimously that it was not. Chase and Iredell said by way of *dicta* that an unconstitutional act is void.

Finally, in 1800, the Supreme Court tried an action to recover a debt owed on a bond dated in 1774. The state of Georgia had, in 1782, banished the plaintiff, confiscated his property, and declared him a traitor. In 1787 it had vested the debt in the state. The Court had to consider the constitutionality of these two acts under the constitution of Georgia. The decision found no violation. Certain passages from the opinions are interesting because of their proximity to Marshall's reasoning in *Marbury v. Madison*:

Washington, J: The presumption, indeed, must always be in favor of the validity of laws, if the contrary is not clearly established.

Chase, J: Although it is alleged that all acts of the legislature, in direct opposition to the prohibitions of the constitution, would be void, yet it still remains a question, where the power resides to declare it void. It is, indeed, a general opinion, it is expressly admitted by all this bar, and some of the judges have, individually, in the circuits, decided that the supreme court can declare an act of congress to be unconstitutional, and, therefore, invalid; but there is no adjudication of the supreme court itself upon the point. . . .

Paterson, J: To authorize this court to pronounce any law void, it must be a clear and unequivocal breach of the constitution, not a doubtful and argumentative application.

Cushing, J: I do not think that the occasion would warrant an exercise of the power.

Cooper v. Telfair, 4 Dallas 14 (1800); *passim*.

With this much of a preamble, it will be readily perceived that Chief Justice Marshall was not announcing an innovation when he read the opinion of the Supreme Court in *Marbury v. Madison*. The force of the decision in that case is that it "ingrafted"—to use Dean Alfange's word⁶—or "established"—as Gerstenberg put it⁷—the veto as an inherent function of the judicial power in constitutional jurisprudence. Up to the date of this case, although it had been clear that an unconstitutional act was void, there was doubt, as Mr. Justice Chase observed in *Cooper v. Telfair*, as to where the power to void it lay. No final authority had settled this point.

All that the decision did was to hold an act of Congress unconstitutional and void. But the reasoning leading to the decision was so sweeping that it embraced also violations by state legislatures of the federal Constitution. If there was any doubt that the power of the Supreme Court reached so far, it was settled by *Fletcher v. Peck*. *Marbury v. Madison* became also authority for state supreme courts to exercise a similar power over unconstitutional acts of state legislatures.

The Formal Adoption of the Doctrine of Judicial Review

RUTGERS V. WADDINGTON.

Mayor's Court, City of New York. August 27, 1784.

[Action of Trespass brought under a New York statute dated March 17, 1783. The Act permitted any inhabitant of the state who had been forced to leave his property because of the British invasion to bring an action of trespass against any person who may have occupied this property during the owner's absence. Elizabeth Rutgers complained that Joshua Waddington, a British subject, had occupied four properties belonging to her, under the conditions covered by the statute of 1783. Waddington pleaded, *inter alia*, to the whole of the trespass, that Rutgers had no action because of the Treaty of Peace, September 3, 1783, concluded between the United States and Great Britain, by which all claims for damages which the citizens or subjects of one of the contracting parties might have against those of the other for any act done which related to the war in any way were relinquished.]

The Honorable the Mayor, James Duane, Esq., delivered the opinion of the court.

In the case of *Elizabeth Rutgers* versus *Josbua Waddington*, which

⁶ *The Supreme Court and the National Will* (New York, 1937), p. 31.

⁷ *American Constitutional Law* (New York, 1937), p. 83, note 5.

we gave notice should be determined this day, the court now proceed to judgment. It is represented to be a controversy of high importance. . . .

We must acknowledge there appears to us very great force in the observation arising from the federal compact. By this compact these States are bound together as one great independent nation; and with respect to their common and national affairs, exercise a joint sovereignty, whose will can only be manifested by the acts of their delegates in Congress assembled. As a nation they must be guided by one common law of nations; for on any other principles how can they act with regard to foreign powers; and how shall foreign powers act towards them? It seems evident that abroad they can only be known in their federal capacity. What then must be the effect? What the confusion? if each separate State should arrogate to itself a right of changing at pleasure those laws, which are received as a rule of conduct, by the common consent of the greatest part of the civilized world.

We shall deduce only one inference from what hath been here observed—that to abrogate or alter any one of the known laws or usages of nations, by the authority of a single State, must be contrary to the very nature of the confederacy, and the evident intention of the articles, by which it is established, as well as dangerous to the Union itself. . . .

It has been further objected, that Congress could form no treaty of peace to reach our internal police.

There is a great distinction between the authority of the treaty, and its operation and effects.

The first we hold to be sacred and shall never, as far as we have power, suffer it to be violated or questioned. . . .

Our Union, as has been properly observed, is known and legalized in our Constitution, and adopted as a fundamental law in the first Act of our Legislature. The federal compact hath vested Congress with full and exclusive powers to make peace and war. This treaty they have made and ratified, and rendered its obligation perpetual.

And we are clearly of opinion, that no State in this Union can alter or abridge, in a single point, the federal articles or the treaty.

But the operation and effects of the treaty, within our own State, are fit subjects of inquiry and decision: according to its spirit and true meaning we must determine our judgment; nor shall any man, by any act of ours, be deprived of the benefits which, on a fair and reasonable construction, he ought to derive from it.

On this occasion, we say with the sage, *Fiat justitia ruat coelum*. . . .

Thus, then, it seems to be agreed, on both sides, that the provision in the statute, being general, cannot extend to all cases, and therefore must receive a reasonable interpretation according to the intention; and not according to the latitude of expression of the legislature: it follows as a

necessary consequence, that the interpretation is the province of the court, and, however difficult the task, that we are bound to perform it. . . . [The court attempts to avoid conflict with the legislature. It proceeds:]

The supremacy of the legislature need not be called into question; if they think fit positively to enact a law, there is no power which can control them. When the main object of such a law is clearly expressed, and the intention manifest, the judges are not at liberty, although it appears to them to be unreasonable, to reject it; for this were to set the judicial above the legislative, which would be subversive of all government. But when a law is expressed in general words, and some collateral matter, which happens to arise from those general words, is unreasonable, there the judges are in decency to conclude, that the consequences were not foreseen by the legislature; and therefore they are at liberty to expound the statute by equity, and only *quoad hoc* to disregard it.

When the judicial make these distinctions, they do not control the legislature; they endeavor to give their intention its proper effect.

This is the substance of the authorities, on a comprehensive view of the subject. . . .

That the legislative, judicial, and executive powers of government should be independent of each other, is essential to liberty.

This principle entered deeply into our excellent Constitution [of the state of New York], and was one of the inducements to the establishment of the Council of Revision, that the judicial and executive of whom it is composed, might have the means of guarding their respective rights, against the encroachments of the legislature, whether by design, "or by haste or unadvisedness." For this and other purposes, all bills, which have passed the Senate and Assembly, before they become laws, are to be presented to the council for their revisal and consideration; that if it should appear improper to them that any bill should become a law, it may be returned with their objections for further consideration, and become subject to the approbation of two-thirds of the members of each House, before it can be a law.

From this passage of our Constitution, Mr. Attorney seems to regard this determination of the Council of Revision on the law in question, in the light of a judicial decision, by which this court ought to be guided, for the sake of uniformity in the dispensation of justice. But sure the respect, which we owe to this honorable council, ought not to carry us such lengths; it is not to be supposed, that their assent or objection to a bill can have the force of adjudication; for what in such a case would be the fate of a law which prevailed against their sentiments? . . . The institution of this council is sufficiently useful and salutary, without ascribing to their proceedings, effects so extraordinary; nor is it probable, that the high judicial powers themselves, would in the seat of judg-

ment always be precluded, even by their own opinion given in the Council of Revision. . . .

Upon the whole, this being a statute is obligatory, and being general in its provisions, collateral matter arises out of the general words, which happens to be unseasonable. The court is therefore bound to conclude, that such a consequence was not foreseen by the legislature, to explain it by equity, and to disregard it in that point only, where it would operate thus unseasonably.

The question then, whether this statute hath in any respect revoked the law of nations, or is repealed by the definitive treaty of peace, or (*sic*; is?) foreign to the circumstances of the case: neither will happen, nor ought to be apprehended.

There is not a tittle in the treaty to which the statute is repugnant. The amnesty is constructive, and made out by reasoning from the law of nations to the treaty.

The repeal of the law of nations, or any interference with it, could not have been in contemplation, in our opinion, when the legislature passed this statute; and we think ourselves bound to exempt that law from its operation: first, because there is no mention of the law of nations, nor the most remote allusion to it, throughout the whole statute; secondly, because it is a subject of the highest national concern and of too much moment to have been intended to be struck at in silence; and to be controlled implicatively under the generality of the terms of the provision; thirdly, because the provision itself is so indefinite, that without any control it would operate in other cases unreasonably, to the oppression of the innocent, and contrary to humanity . . . ; fourthly, because the statute under our consideration doth not contain even the common *non obstante* clause, though it is so frequent in our statute book . . . ; fifthly, because although it is a rule that *posteriores leges prioribus derogant*, . . . at the same time it must be remembered, that repeals by implication are disfavored by law, and never allowed of but where the inconsistency and repugnancy are plain, glaring, and unavoidable. . . .

Whoever, then, is clearly exempted from the operation of this statute by the law of nations, this court must take it for granted, could never have been intended to be comprehended within it by the legislature. . . .

Upon the whole, it is the opinion of this court, that . . . the last plea of the defendant as to the whole of the trespass . . . [is] insufficient in the law; and that only the plea of the defendant in justification of the occupancy between the last day of April, 1780, and the 17th day of March, 1783, is good and sufficient in the law.

NOTE ON *RUTGERS V. WADDINGTON*

Thayer cites a pamphlet printed in New York in 1784 by Samuel Loudon which was edited in Morrisania, 1866, with an introduction, by Henry B. Dawson. Thayer cites the Dawson text for the following quotation from an address "To the People of the United States," November 4, 1784:

"It remains to inquire whether a court of judicature can consistently, with our Constitution and laws, adjudge contrary to the plain and obvious meaning of a statute. That the Mayor's Courts (*sic*) have done so in this case we think is manifest from the foregoing remarks. That there should be a power vested in courts of judicature, whereby they might control the supreme legislative power, we think is absurd in itself. . . . The design of courts of justice in our government from the very nature of their institution, is to *declare* laws, not to *alter* them. Whenever they depart from this design of their institution, they confound legislative and judicial powers. The laws govern where a government is free; and every citizen knows what remedy the laws give him for every injury. But this cannot be the case where courts, if they deem a law to be unreasonable, may set it aside. Here, however plainly the law may be in his favor, he cannot be certain of redress until he has the opinion of the court."

The State's Assembly, at about the same time, resolved, by a vote of 25-15:

"that the judgment aforesaid is, in its tendency, subversive of all law and good order, and leads directly to anarchy and confusion; because if a court instituted for the benefit and government of a corporation may take upon them to dispense with and act in direct violation of a plain and known law of the State, all other courts, either superior or inferior, may do the like; and therewith will end all our dear-bought rights and privileges, and legislatures become useless." *Id.*, i, 72, note.

TREVETT *V.* WEEDEN.

Superior Court of Judicature of Rhode Island. 1786.

Upon the last Monday of September, in the eleventh year of the Independence of the United States, in the city of Newport, and State of Rhode Island, &c., was heard, before the Superior Court of Judicature, Court of Assize, and General Jail-Delivery, a certain information, John Trevett against John Weeden, for refusing to receive the paper bills of this State, in payment for meat sold in market, equivalent to silver or

gold; and upon the day following, the court delivered the unanimous opinion of the judges, that the information was not cognizable before them. [Coxe (Jud. Power and Unconst. Legis. 245) adds this: "The following constitutes the whole of the brief extant report of what was said by them:⁸ 'The court adjourned to next morning, upon opening of which, Judge Howell, in a firm, sensible, and judicious speech, assigned the reasons which induced him to be of the opinion that the information was not cognizable by the court—declared himself independent as a judge—the penal law to be repugnant and unconstitutional—and therefore gave it as his opinion that the court could not take cognizance of the information! Judge Devol was of the same opinion. Judge Tillinghast took notice of the striking repugnancy of the expressions of the act—Without trial by jury, according to the laws of the land—and on that ground gave his judgment the same way. Judge Hazard voted against taking cognizance. The Chief Justice declared the judgment of the court without giving his own opinion.'"]

That this important decision may be fully comprehended, it will be necessary to recur to the Acts of the General Assembly, which superinduced the trial. At the last May session, an Act was made for emitting the sum of one hundred thousand pounds, lawful money, in bills, upon land security, which should pass in all kinds of business and payments of former contracts, upon par with silver and gold. . . . Another Act was passed in the June following, subjecting every person who should refuse the bills in payment for articles offered for sale, or should make a distinction in value between them and silver and gold, or who should in any manner attempt to depreciate them, to a penalty of one hundred pounds, lawful money. . . .

Experience soon evinced the inadequacy of this measure to the objects of the administration: . . . The mode of prosecution and trial was also changed, agreeably to the following clauses: "That the complainant shall apply to either of the judges of the Superior Court of Judicature, &c., within this State, or to either of the judges of the Inferior Court of Common Pleas within the county where such offense shall be committed, and lodge his certain information, which shall be issued by the judge. . . . It is then provided, that the person complained of come before a court to be specially convened by the judge . . . that the said court, when so convened, shall proceed to the trial of said offender . . . without any jury, by a majority of the judges present, according to the laws of the land, and to make adjudication and determination . . . and that the said judgment of said court shall be final and conclusive, and

⁸ Coxe cites from the Providence "Gazette," Oct. 7, 1786, and American Museum, v. 36, which uses the word *unjust* instead of the word *repugnant* which is in the newspaper's account.

from which there shall be no appeal; and in said process no essoin, protection, privilege, or injunction shall be in anywise prayed, granted, or allowed."

John Weeden, being demanded and present in court, made the following answer: "That it appears by the Act of the General Assembly that the said Act hath expired also, for that by the said Act the matters of complaint are made triable before special courts, uncontrollable by the Supreme Judiciary Court of the State; and also for that the court is not, by said Act, authorized and empowered to impanel a jury to try the facts charged in the information; and so the same is unconstitutional and void."

The consequences of the foregoing determination were immediately felt. The shops and stores were generally opened, and business assumed a cheerful aspect. . . .

The demon however of discord was not entirely subdued; for upon the next succeeding week a summons was issued from both Houses of Assembly, requiring an immediate attendance of the judges, "to render their reasons for adjudging an Act of the General Assembly unconstitutional, and so void." Three of the judges attended, the other two being unwell. This circumstance induced the Assembly to dismiss them at that time, but they were directed to appear at the October session next following.

Accordingly three of the judges attended, and gave notice in writing to both Houses, "that they waited their pleasure." They were informed that the Assembly was ready to hear them, and would proceed immediately upon the business for which they were in attendance.

Certain ceremonies being adjusted, and the records of the court produced, the Honorable Mr. Howell, the youngest justice, addressed himself to the Assembly in a very learned, sensible, and elaborate discourse, in which he was upwards of six hours upon the floor.

He observed, that the order by which the judges were before the House might be considered as calling upon them to assist in matters of legislation, or to render the reasons of their judicial determination, as being accountable to the legislature for their judgment.

That in the former point of view, the court was ever ready, as constituting the legal counsellors of the state, to render every kind of assistance to the legislative, in framing new or repealing former laws: but that for the reasons of their judgment upon any question judicially before them, they were accountable only to God and their own consciences.

Under the first head, the honorable gentleman pointed out the objectionable parts of the Act upon which the information was founded, and most clearly demonstrated, by a variety of conclusive arguments, that it was unconstitutional, had not the force of law, and could not be

executed. His arguments were enforced by many authorities of the first eminence, in addition to those produced upon the trial. But as this part of the subject hath in a great measure been anticipated, we shall not enter into a further detail. . . .

Here it was observed, that the legislature had assumed a fact, in their summons to the judges, which was not justified or warranted by the records. The pleas of the defendant, in a matter of mere surplusage, mentions the Act of the General Assembly as "unconstitutional, and so void"; but the judgment of the court simply is, "that the information is not cognizable before them." Hence it appears that the plea hath been mistaken for the judgment.

Whatever might have been the opinion of the judges, they spoke by their records, which admitted of no addition or diminution. They might have been influenced respectively by different reasons, as the whole Act was judicially before them, of which, it being general, they could judge by inspection, without confining themselves to the particular points stated in the plea. It would be out of the power, therefore, of the General Assembly to determine upon the propriety of the court's judgment, without a particular explanation. If this could be required in one instance, it might in all; and so the legislative would become the Supreme Judiciary. A perversion of power totally subversive of civil liberty!

If it be conceded, that the equal distribution of justice is a requisite to answer the purposes of government as the enacting of salutary laws, it is evident that the judiciary power should be as independent as the legislative. And consequently the judges cannot be answerable for their opinion, unless charged with criminality. . . .

JUDGE TILLINGHAST observed, that nothing could have induced the gentlemen of the court to accept the office to which they were appointed, but a regard to the public good; that their perquisites were trifling, and their salaries not worth mentioning. The only recompense they expected, or could receive, was a consciousness of rectitude, which had supported them, and he was confident would support them, through every change of circumstances; that melancholy indeed would be the condition of the citizens, if the Supreme Judiciary of the State was liable to reprehension, whenever the caprice or the resentment of a few leading men should direct a public inquiry!

That, as one member of the court, he felt himself perfectly independent, while moving in the circle of his duty; and however he might be affected for the honor of the State, he was wholly indifferent about any consequences that might possibly respect himself.

That the opinion he had given had resulted from mature reflection and the clearest conviction; that his conscience testified to the purity

of his intentions, and he was happy in the persuasion, that his conduct met the approbation of his God!

JUDGE HAZARD. My brethren have so fully declared my sentiments upon this occasion, that I have nothing to add by way of argument. It gives me pain that the conduct of the court seems to have met the displeasure of the administration. But their obligations were of too sacred a nature for them to aim at pleasing but in the line of their duty.

It is well known that my sentiments have fully accorded with the general system of the legislature in emitting the paper currency; but I never did, I never will, depart from the character of an honest man, to support any measures, however agreeable in themselves. If there could have been a prepossession in my mind, it must have been in favor of the Act of the General Assembly; but it was not possible to resist the force of conviction. The opinion I gave upon the trial was dictated by the energy of truth: I thought it right—I still think so. Be it as it may, we derived our understanding from the Almighty, and to Him only are we accountable for our judgment.

To the observations of the judges, succeeded a very serious and interesting debate among the members, wherein many arguments and observations were adduced on both sides. At length a question was taken, "whether the Assembly was satisfied with the reasons given by the judges in support of their judgment?" It was determined in the negative.

A motion was made, and seconded, "for dismissing the judges from their office." . . . (A memorial and protest from the judges, dated Nov. 4, 1786, was here presented to the Assembly, and Mr. Varnum was allowed to address the House in support of it.)

The claim and demand of the judges, as stated in their memorial, and enforced by their counsel, were followed by a concise, but rational debate, in which the fury of passion, excepting in one or two instances, surrendered to cool reflection, and prepared the way for vindicating the honor of the law, and the dignity of the State. . . .

A motion was made by an honorable member, seconded, and agreed to, that the opinion of the Attorney-General be taken, and the sentiments of the other professional gentlemen requested, whether constitutionally, and agreeably to law, the General Assembly can suspend, or remove from office, the judges of the Supreme Judiciary Court, without a previous charge and statement of criminality, due process, trial, and conviction thereon? . . . (Addresses were then made by "Mr. Channing, the Attorney-General," and three others, to the effect that the judges could only be removed by impeachment or other regular process.) The two professional gentlemen in the House, the Honorable Mr. Marchant and Mr. Bourne, confirmed the sentiments of their brethren, in the leading points, by a masterly display of legal talents.

The only question remaining was, whether the judges should be discharged from any further attendance upon the General Assembly, as no accusation appeared against them? The question was put, and decided by a very great majority, "that as the judges are not charged with any criminality in rendering the judgment, upon the information, Trevett against Weeden, they are therefor discharged from any further attendance upon this Assembly, on that account."⁹

NOTE ON TREVETT *v.* WEEDEN

The narrative in the text appears also in Peleg W. Chandler: *American Criminal Trials*, 2 vols., Boston, 1841. The title there is, Proceedings of the General Assembly of Rhode Island against the Judges of the Supreme Court of Judicature, 1786. The account is to be found in ii. 267.

Bayard v. Singleton, the third of the three cases noted as occurring during the time of the Confederation, makes no substantial addition to the views expressed in the two cases reproduced here. Like the *Rutgers* case, it arose under one of the confiscatory acts by which British Tories lost their property. The original owner sought to regain possession in the face of a state statute requiring state courts to dismiss such suits on motion. The court overruled the motion and proceeded with the trial, on the ground that the state's constitution gave to the citizens of the state a right to a trial by jury for the satisfaction of property rights.

MARBURY *v.* MADISON.

Supreme Court of the United States. 1803.

1 Cranch 137.

[President Adams nominated, and appointed by and with the advice and consent of the Senate, William Marbury to be justice of the peace for the county of Washington in the District of Columbia. Marbury's commission was signed and sealed in due form, but was not delivered before President Adams' term of office expired. His successor in office, President Jefferson, instructed James Madison, Secretary of State, to withhold Marbury's commission. Marbury sought a writ of *mandamus* against Madison to compel delivery.]

Chief Justice Marshall delivered the opinion of the Court.

In the order in which the court has viewed this subject, the following questions have been considered and decided.

⁹ Thayer: *Cases on Constitutional Law*; Charles W. Sever, Cambridge, 1895, i., p. 73. Thayer used a pamphlet written by James M. Varnum. Providence: John Carter, 1787.

1st. Has the applicant a right to the commission he demands?

[The Court finds that he has, and that the right has been violated.]

2dly. If he has a right, and that right has been violated, do the laws of his country afford him a remedy?

[The Court finds that they do.]

3dly. If they do afford him a remedy, is it a *mandamus* issuing from this court?

[The Court finds the *mandamus* an appropriate remedy.]

This, then, is a plain case for a *mandamus* . . . and it only remains to be inquired,

Whether it can issue from this court.

The act to establish the judicial courts of the United States authorizes the supreme court "to issue writs of *mandamus*, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States."

The secretary of state, being a person holding an office under the authority of the United States, is precisely within the letter of the description; and if this court is not authorized to issue a writ of *mandamus* to such an officer, it must be because the law is unconstitutional. . . .

The constitution vests the whole judicial power of the United States in one supreme court, and such inferior courts as congress shall, from time to time, ordain and establish. . . .

In the distribution of this power it is declared that "the supreme court shall have original jurisdiction in all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party. In all other cases, the supreme court shall have appellate jurisdiction."

. . . . If Congress remains at liberty to give this court appellate jurisdiction, where the constitution has declared their jurisdiction shall be original; and original jurisdiction where the constitution has declared it shall be appellate; the distribution of jurisdiction, made in the constitution, is form without substance. . . .

It cannot be presumed that any clause in the constitution is intended to be without effect; and, therefore, such a construction is inadmissible, unless the words require it. . . .

To enable this court, then, to issue a *mandamus*, it must be shown to be an exercise of appellate jurisdiction, or to be necessary to enable them to exercise appellate jurisdiction. . . .

The authority, therefore, given to the supreme court, by the act establishing the judicial courts of the United States, to issue writs of *mandamus* to public offices, appears not to be warranted by the constitution; and it becomes necessary to inquire whether a jurisdiction so conferred can be exercised.

The question, whether an act repugnant to the constitution can become the law of the land, is a question deeply interesting to the United States. . . .

That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. . . . The principles, therefore, so established, are deemed fundamental. And as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent.

This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments.

The government of the United States is of the latter description. The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.

Between these alternatives there is no middle ground. The constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it.

If the former part of the alternative is true, then a legislative act contrary to the constitution, is not law; if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.

Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and, consequently, the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.

This theory is essentially attached to a written constitution, and is consequently to be considered, by this court, as one of the fundamental principles of our society. It is not, therefore, to be lost sight of in the further consideration of this subject.

If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow

in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret the rule. If two laws conflict with each other, the courts must decide on the operation of each.

So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution, or conformably to the constitution, disregarding the law, the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

If, then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply.

Those, then, who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law.

This doctrine would subvert the very foundation of all written constitutions. It would declare that an act which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.

That it thus reduces to nothing what we have deemed the greatest improvement on political institutions, a written constitution, would of itself be sufficient, in America, where written constitutions have been viewed with so much reverence, for rejecting the construction. But the peculiar expressions of the constitution of the United States furnish additional arguments in favor of its rejection.

The judicial power of the United States is extended to all cases arising under the constitution.

Could it be the intention of those who gave this power, to say that in using it the constitution should not be looked into? That a case arising under the constitution should be decided without examining the instrument under which it arises?

This is too extravagant to be maintained.

In some cases, then, the constitution must be looked into by the

judges. And if they can open it at all, what part of it are they forbidden to read or to obey?

There are many other parts of the constitution which serve to illustrate this subject.

It is declared that "no tax or duty shall be laid on articles exported from any State." Suppose a duty on the export of cotton, of tobacco, or of flour; and a suit instituted to recover it. Ought judgment to be rendered in such a case? ought the judges to close their eyes on the constitution, and only see the law.

The constitution declares "that no bill of attainder or *ex post facto* law shall be passed."

If, however, such a bill should be passed, and a person should be prosecuted under it, must the court condemn to death those victims whom the constitution endeavors to preserve?

"No person," says the constitution, "shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court."

Here the language of the constitution is addressed especially to the courts. It prescribes, directly for them, a rule of evidence not to be departed from. If the legislature should change that rule, and declare one witness, or a confession out of court, sufficient for conviction, must the constitutional principle yield to the legislative act?

From these, and many other selections which might be made, it is apparent that the framers of the constitution contemplated that instrument as a rule for the government of courts, as well as of the legislature.

Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies in an especial manner to their conduct in their official character. . . .

The oath of office, too, imposed by the legislature, is completely demonstrative of the legislative opinion on this subject. It is in these words: "I do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me as . . . , according to the best of my abilities and understanding, agreeably to the constitution and laws of the United States."

Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government—if it is closed upon him, and cannot be inspected by him?

If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime.

It is also not entirely unworthy of observation, that in declaring what shall be the supreme law of the land, the constitution itself is first mentioned; and not the laws of the United States generally, but those

only which shall be made in pursuance of the constitution, have that rank.

Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument.¹⁰

The rule must be discharged.

FLETCHER *v.* PECK.

Supreme Court of the United States. 1810.
6 Cranch 87.

Error to the circuit court of the United States for the district of Massachusetts, in action of covenant brought by Fletcher against Peck.

The facts are stated in the opinion.

Marshall, C.J., delivered the opinion of the court.

This suit was instituted on several covenants contained in a deed made by John Peck, the defendant in error, conveying to Robert Fletcher, the plaintiff in error, certain lands which were part of a large purchase made by James Gunn and others, in the year 1795, from the State of Georgia, the contract for which was made in the form of a bill passed by the legislature of that State. . . .

The plea in bar sets forth the constitution of the State of Georgia, and avers that the lands sold by the defendant to the plaintiff, were within that State. It then sets forth the granting act, and avers the power of the legislature to sell and dispose of the premises as pointed out by the act.

To this plea the plaintiff below demurred, and the defendant joined in demurrer.

That the legislature of Georgia, unless restrained by its own constitution, possesses the power of disposing of the unappropriated lands within its own limits, in such manner as its own judgment shall dictate, is a proposition not to be controverted. The only question, then, presented by this demurrer, for the consideration of the court, is this, did the then

¹⁰ But the Supreme Court has power to issue a writ of *habeas corpus* as being within its appellate jurisdiction, where it is a revision of the decision of a lower court. *Ex parte Bollman* and *Ex parte Swartwout*, 4 Cr. 75 (1807).

This case arose out of the Burr conspiracy. The Court released the prisoners on the ground that they were held on evidence insufficient to warrant a trial of the offense of which they were accused—treason. President Jefferson took the decision as a personal affront by Marshall.—Ed.

constitution of the State of Georgia prohibit the legislature to dispose of the lands, which were the subject of this contract, in the manner stipulated by the contract?

The question, whether a law be void for its repugnancy to the constitution, is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station, could it be unmindful of the solemn obligations which that station imposes. But it is not on a slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other.

In this case the court can perceive of no such opposition. . . .

The 3d covenant is, that all the title which the State of Georgia ever had in the premises had been legally conveyed to John Peck, the grantor.

The 2d count assigns, in substance, as a breach of this covenant, that the original grantees from the State of Georgia promised and assured divers members of the legislature, then sitting in general assembly, that if the said members would assent to, and vote for, the passing of the act, and if the said bill should pass, such members should have a share of, and be interested in, all the lands purchased from the said State by virtue of such law. And that divers of the said members, to whom the said promises were made, were unduly influenced thereby, and, under such influence, did vote for the passage of the said bill; by reason whereof the said law was a nullity

The plea to this count avers, that until after the purchase made from the original grantees by James Greenleaf, under whom the said Peck claims, neither the said James Greenleaf, nor the said Peck had any notice or knowledge that any such promises or assurances were made by the said original grantees to any of the members of the legislature of the State of Georgia. . . .

That corruption should find its way into the governments of our infant republics, and contaminate the very source of legislation, or that impure motives should contribute to the passage of a law, or the formation of a legislative contract, are circumstances most deeply to be deplored. . . . It may well be doubted how far the validity of a law depends upon the motives of its framers, and how far the particular inducements, operating on members of the supreme sovereign power of a State, to the formation of a contract by that power, are examinable in a court of justice. If the principle be conceded, that an act of the supreme sovereign power might be declared null by a court, in consequence of the means which procured it, still would there be much diffi-

culty in saying to what extent those means must be applied to produce this effect. Must it be direct corruption . . . ? Must the vitiating cause operate on a majority, or on what number of the members? Would an act be null, whatever might be the wish of the nation, or would its obligation of nullity depend upon the public sentiment? . . .

This solemn question cannot be brought thus collaterally and incidentally before the court. . . . If the title be plainly deduced from a legislative act, which the legislature might constitutionally pass, if the act be clothed with all the requisite forms of a law, a court, sitting as a court of law, cannot sustain a suit brought by one individual against another founded on the allegation that the act is a nullity, in consequence of the impure motives which influenced certain members of the legislature which passed the law. . . .

The third count . . . alleges that, in consequence of these practices and of other causes, a subsequent legislature passed an act annulling and rescinding the law under which the conveyance to the original grantees was made, declaring that conveyance void, and asserting the title of the State to the lands it contained. . . .

The lands in controversy vested absolutely in James Gunn and others, the original grantees, by the conveyance of the governor, made in pursuance of an act of assembly to which the legislature was fully competent. Being thus in full possession of the legal estate, they, for a valuable consideration, conveyed portions of the land to those who were willing to purchase. If the original transaction was infected with fraud, these purchasers did not participate in it, and had no notice of it. They were innocent. Yet the legislature of Georgia has involved them in the fate of the first parties to the transaction, and, if the act be valid, has annihilated their rights also.

The legislature of Georgia was a party to this transaction; and for a party to pronounce its own deed invalid, whatever cause may be assigned for its invalidity, must be considered as a mere act of power which must find its vindication in a train of reasoning not often heard in courts of justice. . . .

It is not intended to speak with disrespect of the legislature of Georgia, or of its acts. Far from it. The question is a general question, and is treated as one. For although such powerful objections to a legislative grant, as are alleged against this, may not again exist, yet the principle, on which alone this rescinding act is to be supported, may be applied to every case to which it shall be the will of any legislature to apply it. The principle is this: that a legislature may, by its own act, divest the vested estate of any man whatever, for reasons which shall, by itself, be deemed sufficient.

. . . . Their case is not distinguishable from the ordinary case of

purchasers of a legal estate without knowledge of any secret fraud which might have led to the emanation of the original grant. . . .

Is the power of the legislature competent to the annihilation of such title, and to a resumption of the property thus held? The principle asserted is, that one legislature is competent to repeal any act which a former legislature was competent to pass; and that one legislature cannot abridge the powers of a succeeding legislature.

The correctness of this principle, so far as respects general legislation, can never be controverted. But if an act be done under a law, a succeeding legislature cannot undo it. . . .

When, then, a law is in its nature a contract, when absolute rights have vested under that contract, a repeal of the law cannot divest those rights. . . .

The validity of this rescinding act, then, might well be doubted, were Georgia a single sovereign power. But Georgia cannot be viewed as a single sovereign power. . . . She is part of a large empire; she is a member of the American Union; and that union has a constitution the supremacy of which all acknowledge, and which imposes limits to the legislation of the several States, which none can claim a right to pass. The constitution of the United States declares that no State shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts.

Does the case now under consideration come within this prohibitory section of the constitution?

In considering this very interesting question, we immediately ask ourselves what is a contract? Is a grant a contract?

A contract is a compact between two or more parties, and is either executory or executed. An executory contract is one in which a party binds himself to do, or not to do, a particular thing; such was the law under which the conveyance was made by the governor. A contract executed is one in which the object of contract is performed. . . . The contract between Georgia and the purchasers was executed by the grant. . . .

Since, then, in fact, a grant is a contract executed, the obligation of which still continues, and since the constitution uses the general term contract, without distinguishing between those which are executory and those which are executed, it must be construed to comprehend the latter as well as the former. . . .

If, under a fair construction of the constitution, grants are comprehended under the term contracts, is a grant from the State excluded from the operation of the provision?

The words themselves contain no such distinction. They are general, and are applicable to contracts of every description. . . .

Whatever respect might have been felt for the State sovereignties, it is not to be disguised that the framers of the constitution viewed, with some apprehension, the violent acts which might grow out of the feelings of the moment; and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed. The restrictions on the legislative power of the States are obviously founded in this sentiment; and the Constitution of the United States contains what may be deemed a bill of rights for the people of each State. . . .

It is, then, the unanimous opinion of the court, that, in this case, . . . the State of Georgia was restrained, either by general principles which are common to our free institutions, or by the particular provisions of the Constitution of the United States, from passing a law whereby the estate of the plaintiff in the premises so purchased could be constitutionally and legally impaired and rendered null and void. . . .

JOHNSON, J. In this case I entertain, on two points, an opinion different from that which has been delivered by the court.

I do not hesitate to declare that a State does not possess the power of revoking its own grants. But I do it on a general principle, on the reason and nature of things: a principle which will impose laws even on the Deity.

A contrary opinion can only be maintained upon the ground that no existing legislature can abridge the powers of those which will succeed it. To a certain extent this is certainly correct; but the distinction lies between power and interest, the right of jurisdiction and the right of soil.

The right of jurisdiction is essentially connected to, or rather identified with, the national sovereignty. To part with it is to commit a species of political suicide. In fact a power to produce its own annihilation is an absurdity in terms. . . . But it is not so with the interests or property of a nation. Its possessions nationally are in nowise necessary to its political existence. . . .

As to the idea, that the grants of a legislature may be void because the legislature is corrupt, it appears to me to be subject to insuperable difficulties. . . .

The security of a people against the misconduct of their rulers, must lie in the frequent recurrence to first principles, and the imposition of adequate constitutional restrictions. . . .

I have thrown out these ideas that I may have it distinctly understood that my opinion on this point is not founded on the provision in the Constitution of the United States, relative to laws impairing the obligation of contracts. It is much to be regretted that words of less equivocal signification had not been adopted in that article of the constitution.

There is reason to believe . . . that the object of the convention was to afford a general protection to individual rights against the acts of the State legislatures. Whether the words, "acts impairing the obligation of contracts," can be construed to have the same force as must have been given to the words "obligation and effect of contracts," is the difficulty in my mind. . . .

To give it the general effect of a restriction of the State powers in favor of private rights, is certainly going very far beyond the obvious and necessary import of the words, and would operate to restrict the States in the exercise of that right which every community must exercise, of possessing itself of the property of the individual, when necessary for public uses. . . .

I have been very unwilling to proceed to the decision of this cause at all. It appears to me to bear strong evidence of being a mere feigned case. It is our duty to decide on the rights, but not on the speculations of parties. . . .

NOTE ON THE SCOPE OF JUDICIAL REVIEW

The first case in the next group marks a growth in the expansion of the doctrine of judicial review which is akin to that of *Marbury v. Madison*. In respect to acts of Congress, the Supreme Court had used its veto power sparingly,¹¹ during the period between the two decisions. The number of decisions voiding state legislation as contrary to provisions of the federal Constitution has not been counted. It would inevitably be considerably greater, and include proportionately more cases of major importance, because of the number of jurisdictions involved. In respect to the substance of the opinions, the Court had used its reviewing powers for the ascertainment of legal facts, the definition of questions of law, and the elucidation of broad constitutional principles. But after the Civil War there came a marked change¹² in the issues which the Court had to decide. The extraordinary industrial development of the country¹³ brought to the Court from both the national and state juris-

¹¹ Once each in 1857, 1865, 1867, 1868, 1869; three times in 1870; once each in 1871, 1872, 1873, 1876, 1878, 1879; twice in 1883; once each in 1886, 1887, 1888. Evans, *Cases on American Constitutional Law* (4th ed. by Fenwick, Chicago, 1938), note by Evans, p. 25, citing Library of Congress (W. C. Gilbert), *Provisions of Federal Law Held Unconstitutional by the Supreme Court of the United States* (Government Printing Office, 1936). In this list were only a few cases of the first rank. My suggestions would be: *Scott v. Sandford*, 19 How. 393 (1857); *Hepburn v. Griswold*, 8 Wall. 603 (1870); *The Collector v. Day*, 11 Wall. 113 (1871); and the *Civil Rights Cases*, 109 U.S. 3 (1883).

¹² See Frankfurter and Landis, *The Business of the Supreme Court* (New York, 1927), pp. 55-64, 307-318; and the table showing litigation on p. 302.

¹³ See Beard, *The Rise of American Civilization* (2 vols., New York, 1927) Vol. I., ch. 14, and Vol. II., ch. 20 and 22; Parrington, *Main Currents in American Thought* (New York, 1927), *passim*.

dictions searching questions of power. The Court found itself required to review extra-legal facts in order to determine constitutionality. Thus the constitutional issue before the Court came to be the reasonableness of the legislation. To determine its reasonableness, the Court had to pass on the relation of the statute to the economic conditions to which it was a response.¹⁴ In other words, the Supreme Court charged itself with (a) deciding whether the facts which the legislature said existed did exist; (b) whether they warranted the legislative remedy proposed; and (c) where the enactment was calculated to accomplish its objective, whether this end was "constitutional." But the wisdom of the legislative act or of the policy which called it forth have been from the beginning excluded from judicial review.

The element of reasonableness may be raised in a large field of constitutional questions today; but this latitude is the product of a slow development. It seems to have appeared first in the *Slaughter House Cases*, 16 Wallace 36 (1872), as a subsidiary argument by counsel for the butchers and was little noticed by the Court. From that time on until 1890, the year of the decision in the principal case, the Court was under pressure to apply the test of reasonableness.

This time the battle ground was the rate-making power of a state legislature. The states generally had begun a policy of regulating railroads—common carriers, as they were called. The keystone of this policy was the fixing of rates which the railroads might charge for the transportation of freight. Such legislation had a three-fold objective: to break the cut-throat competition between the railway companies which characterized the period; to prevent discrimination in favor of certain shippers or particular localities; and to secure for the public protection against exorbitant charges. The railroads answered by invoking the interstate commerce clause where that was applicable, and the due process clause of the Fourteenth Amendment.¹⁵ It is the latter clause which is applied in the present case.

It is important to note just what was decided. The Supreme Court invalidated the Minnesota statute not because there was any lack of power in the state, but because the state had failed to provide judicial machinery to investigate the reasonableness of the rates fixed by the railway commission. "There is no power in the courts to stay the hands of the commission, if it chooses to establish rates that are unequal and un-

¹⁴ Gerstenberg, *op. cit.*, note 12, p. 85, lists the provisions of the federal Constitution under which cases arise in which "factual judgments control constitutionality": I.8.3. (commerce clause); I.10 (contracts); IV.1 (full faith and credit); IV.2.1. (privileges and immunities); V. and Amendment XIV (due process); and the equal protection clause of the XIVth Amendment.

¹⁵ The leading case under the interstate commerce clause is the *Shreveport Case*, 234 U.S. 342 (1914). See the chapter on Interstate Commerce.

reasonable." In order to assign this omission as a ground for voiding the statute, the Court announced that reasonableness is a part of due process.

If due process meant simply reasonable process, the comparison with *Marbury v. Madison* would be extravagant. Furthermore, as both the concurring and the dissenting opinions point out, there would be grave doubt as to whether the statute could be invalidated. The gravamen of the opinion is, that it is the *judicial* estimate of reasonableness which must prevail if due process is to be accorded; and it is this element in the majority opinion which marks an extension of judicial review. The Court, in effect, substitutes its judgment for that of the legislature in the matter of compensation to be charged for the services to be performed, by making an independent investigation of economic facts as a test of constitutionality. But obviously, this type of inquiry is not to be restricted to legislation controlling rate-making. Laws which attempt to deal with problems arising out of the economic struggle or out of living conditions are subject to judicial evaluation to an equal extent. Where legislation may be challenged as capricious or as arbitrary, there the test of reasonableness may be applied.¹⁶

The *Chicago, Milwaukee & St. Paul* case marks in the fields of rate-making the formal adoption of the wish expressed by Mr. Justice Bradley in his concurring opinion in *Davidson v. New Orleans*, 96 U.S. 97 (1878), at page 107:

"I think, therefore, we are entitled, under the fourteenth amendment, not only to see that there is some process of law, but 'due process of law', provided by the state law when a citizen is deprived of his property; and that, in judging what is 'due process of law', respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or none of these; and if found to be suitable or admissible in the special case, it will be adjudged to be 'due process of law'; but if found to be arbitrary, oppressive, and unjust, it may be declared to be not 'due process of law'."

¹⁶ Haines has neatly differentiated the traditional and the modern practice of judicial review. In the early period, he says (up to 1890), the object of judicial review was "to control the competency of the legislature to deal with certain subjects, and not the way in which the legislature had dealt with" them. Charles Grove Haines, *The Revival of Natural Law Concepts* (Cambridge, 1930); p. 207. See on the point made here, ch. 7 and 8, *ibid.* See also Louis A. Warsoff, *Equality and the Law* (New York, 1938); ch. 7 and 8.

The Expansion of Judicial Review

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY CO. v. MINNESOTA.

Supreme Court of the United States. 1890.
134 U.S. 418.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

The Chicago, Milwaukee and St. Paul Railway Company is a corporation organized under the laws of Wisconsin. The line of railroad owned and operated by it in the present case extends from Calmar, in Iowa, to St. Paul and Minneapolis being wholly in Minnesota from the point where it crosses the state line between Iowa and Minnesota. It was constructed under a charter granted by the Territory of Minnesota to the Minneapolis and Cedar Valley Railroad Company. Section 9 of that act provided that the directors of the corporation should have power to make all needful rules and regulations and by-laws touching "the rates of toll and the manner of collecting the same;" and section 13, that the company should have power to unite its railroad with any other railroad which was then, or thereafter might be, constructed in the Territory of Minnesota, or adjoining States or Territories, and should have power to consolidate its stock with any other company or companies.

By an act passed March 3, 1857, the Congress of the United States made a grant of land to the Territory of Minnesota to aid in constructing certain railroads. By an act of the legislature of the Territory a portion of such grant was conferred upon the Minneapolis and Cedar Valley Railroad Company. Subsequently, in 1860, the State of Minnesota became the owner of that company. By an act approved March 10, 1862, the State incorporated the Minneapolis, Fairbault and Cedar Valley Railroad Company, and conveyed to it all the franchises and property of the Minneapolis and Cedar Valley Railroad Company which the State had so acquired; and the name was changed to that of the Minnesota Central Railway Company. . . . In August, 1867, the entire road by way of Calmar to St. Paul and Minneapolis, was conveyed to the Chicago, Milwaukee and St. Paul Railway Company, which succeeded to all the franchises so granted to the Minneapolis and Cedar Valley Railroad Company.

It is contended for the railway company that the State of Minnesota is bound by the contract made by the Territory in the charter granted to the Minneapolis and Cedar Valley Railroad Company; that a contract

existed that the company should have the power of regulating its rates of toll; and that no subsequent legislation of the State could deprive the directors of the company of the power to fix its rates of toll, subject only to the general provision of the law that such rates should be reasonable.

But we are of opinion that the general language of the ninth section of the charter of the Minneapolis and Cedar Valley Railroad Company cannot be held to constitute an irrepealable contract with that company that it should have the right for all future time to prescribe its rates of toll, free from all control by the legislature of the State.

It was held by this court in *Pennsylvania Railroad Co. v. Miller*, 132 U.S. 75, in accordance with a long course of decisions both in the state courts and in this court, that a railroad corporation takes its charter subject to the general law of the State and subject to future constitutional provisions and future general legislation, in the absence of any prior contract with it exempting it from liability to such future general legislation in respect of the subject matter involved; and that exemption from future general legislation cannot be admitted to exist unless it is given expressly, or unless it follows by an implication equally clear with express words. . . .

There being, therefore, no contract or chartered right in the railroad company which can prevent the legislature from regulating in some form the charges of the company for transportation, the question is whether the form adopted in the present case is valid.

[The case arose on proceedings taken by the Railroad and Warehouse Commission of the State of Minnesota, under an act of the legislature of that State, approved March 7, 1887. . . . The second section declares "that all charges made by any common carrier, subject to the provisions of this act, for any service rendered in the transportation of passengers or property as aforesaid shall be equal and reasonable. . . . " The eighth section provides that every common carrier shall print and keep for public inspection schedules of the charges which it has established that it shall make no change therein except after ten days' public notice, plainly stating the changes proposed to be made, and the time when they will go into effect that in case the commission shall find at any time that any part of the tariffs of charges so filed and published is in any respect unequal or unreasonable, it shall have the power to compel any common carrier to change the same and adopt such charge as the commission "shall declare to be equal and reasonable" that in case the carrier shall neglect for ten days after such notice to adopt such tariff as the commission recommends, it shall be the duty of the latter to immediately publish such tariff and it shall be unlawful thereafter for the carrier to charge

a higher or lower rate than that so fixed and that (the carrier) shall be subject to a writ of *mandamus* on application of the commission, to compel compliance with the recommendation of the commission, and a failure to comply with the requirements of the *mandamus* shall be punishable as and for contempt, and the commission may apply also for an injunction against the carrier from receiving or transporting property or passengers within the State until it shall have complied with the recommendation of the commission. . . .]

The construction put upon the statute by the Supreme Court of Minnesota must be accepted by this court, for the purposes of the present case, as conclusive. . . . The Supreme Court authoritatively declares that it is the expressed intention of the legislature of Minnesota, by the statute, that the rates recommended and published by the commission are not simply advisory, nor merely *prima facie* equal and reasonable, but final and conclusive as to what are equal and reasonable charges; that the law neither contemplates nor allows any issue to be made or inquiry to be had as to their equality or reasonableness in fact. . . . In other words, although the railroad company is forbidden to establish rates that are not equal and reasonable, there is no power in the courts to stay the hands of the commission, if it chooses to establish rates that are unequal and unreasonable.

This being the construction of the statute by which we are bound in considering the present case, we are of opinion that, so construed, it conflicts with the Constitution of the United States. . . . It deprives the company of its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefor, as an absolute formality, the action of a railroad commission which, in view of the powers conceded to it by the state court, cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice.

. . . . No hearing is provided for, no summons or notice to the company before the commission has found what it is to find and declared what it is to declare, no opportunity provided for the company to introduce witnesses before the commission, in fact, nothing which has the semblance of due process of law; and although, in the present case, it appears that, prior to the decision of the commission, the company appeared before it by its agent, and the commission investigated the rates charged by the company for transporting milk, yet it does not appear what the character of the investigation was or how the result was arrived at.

. . . . In the present case, the return alleged that the rate of charge

fixed by the commission was not equal or reasonable, and the Supreme Court held that the statute deprived the company of the right to show that judicially. The question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law and in violation of the Constitution of the United States. . . .

MR. JUSTICE MILLER concurring.

I concur with some hesitation in the judgment of the court, but wish to make a few suggestions of the principles which I think should govern this class of questions in the courts. Not desiring to make a dissent, I will state them in the form of propositions.

1. In regard to the business of common carriers limited to points within a single State, that State has the legislative power to establish the rates of compensation for such carriage.

2. The power which the legislature has to do this can be exercised through a commission. . . .

3. Neither the legislature nor such commission can establish arbitrarily and without regard to justice and right a tariff of rates for such transportation, which is unreasonable or extravagant. . . .

4. In either of these classes of cases there is an ultimate remedy in the courts where the tariff of rates is such as to deprive a party of his property without due process of law.

5. But until the judiciary has been appealed to , the tariff of rates so fixed is the law of the land. . . .

6. That the proper, if not the only, mode of judicial relief is by a bill in chancery asserting its unreasonable character. . . .

7. That until this is done it is not competent for each [party] to raise a contest in the courts. . . .

8. But in the present case, where an application is made to the Supreme Court of the State to compel the common carriers, which is equivalent to establishing by judicial proceeding the reasonableness of the charges fixed by the commission, I think the court has the right and duty to inquire into the reasonableness of the tariff. . . .

9. I do not agree that it was necessary to the validity of the action of the commission that previous notice should have been given to all common carriers interested in the rates. . . .

10. But when the question becomes a judicial one, and the validity and justice of these rates are to be established or rejected by the judgment of a court, it is necessary that the railroad corporations interested should have notice and have a right to be heard on the question. . . .

MR. JUSTICE BRADLEY (with whom concurred MR. JUSTICE GRAY and MR. JUSTICE LAMAR) dissenting.

I cannot agree to the decision of the court in this case. It practically overrules *Mum v. Illinois*, 94 U.S. 113. . . . The governing principle of those cases was that the regulation and settlement of the fares of railroads and other public accommodations is a legislative prerogative and not a judicial one. This is a principle which I regard as of great importance. . . .

Thus, the legislature either fixes the charges at rates which it deems reasonable; or merely declares that they shall be reasonable; and it is only in the latter case, where what is reasonable is left open, that the courts have jurisdiction of the subject. I repeat: When the legislature declares that the charges shall be reasonable, or, which is the same thing, allows the common law rule to that effect to prevail, and leaves the matter there; then resort may be had to the courts to inquire judicially whether the charges are reasonable. Then, and not till then, is it a judicial question. But the legislature has the right, and it is its prerogative, if it chooses to exercise it, to declare what is reasonable. . . .

It is always a delicate thing for the courts to make an issue with the legislative department of the government, and they should never do so if it is possible to avoid it. By the decision now made we declare, in effect, that the judiciary, and not the legislature, is the final arbiter in the regulation of fares and freights of railroads and the charges of other public accommodations. It is an assumption of authority on the part of the judiciary which, it seems to me, with all due deference to the judgment of my brethren, it has no right to make. The assertion of jurisdiction by this court makes it the duty of every court of general jurisdiction, state or federal, to entertain complaints against the decisions of the boards of commissioners appointed by the States to regulate their railroads; for all courts are bound by the Constitution of the United States, the same as we are. Our jurisdiction is merely appellate. . . .

In the case of *Davidson v. City of New Orleans*, 96 U.S. 97, we decided that the appointment of a board of assessors for assessing damages was not only due process of law, but the proper method for making assessments to distribute the burden of a public work amongst those who are benefited by it. No one questions the constitutionality or propriety of boards for assessing property for taxation, or for the improvement of

streets, sewers and the like. . . . Due process of law does not always require a court. It merely requires such tribunals and proceedings as are proper to the subject in hand. In the *Railroad Commission Cases*, 116 U.S. 307, we held that a board of commissioners is a proper tribunal for determining the proper rates of fare and freight on the railroads of a state. . . .

It is complained that the decisions of the board are final and without appeal. So are the decisions of the courts in matters within their jurisdiction. There must be a final tribunal somewhere for deciding every question in the world. Injustice may take place in all tribunals. . . . The important question always is, what is the lawful tribunal for the particular case? . . .

If not in terms, yet in effect, the present cases are treated as if the constitutional prohibition was, that no state shall take private property for public use without just compensation,—and as if it was our duty to judge of the compensation. But there is no such clause in the constitution of the United States. The Fifth Amendment is prohibitory upon the federal government only, and not upon state governments. In this matter,—just compensation for property taken for public use,—the state makes their (*sic*) own regulations, by constitution, or otherwise. They are only required by the federal Constitution to provide “due process of law.” . . .

I do not mean to say that the legislature, or its constituted board of commissioners, or other legislative agency, may not so act as to deprive parties of their property without due process of law. The Constitution contemplates the possibility of such an invasion of rights. But, acting within their jurisdiction, (as in these cases they have done,) the invasion should be clear and unmistakable to bring the case within that category. Nothing of the kind exists in the cases before us. The legislature, in establishing the commission, did not exceed its power; and the commission, in acting upon the cases, did not exceed its jurisdiction, and was not chargeable with fraudulent behavior. There was merely a difference of judgment as to amount, between the commission and the companies. . . . Deprivation of property by mere arbitrary power on the part of the legislature, or fraud on the part of the commission, are the only grounds on which judicial relief may be sought against their action. There was, in truth, no deprivation of property in these cases at all. There was merely a regulation as to the enjoyment of property. . . .

It may be that our legislatures are invested with too much power, open, as they are, to influences so dangerous to the interests of individuals, corporations and society. But such is the Constitution of our republican form of government; and we are bound to abide by it until it can be corrected in a legitimate way. If our legislatures become too arbitrary

in the exercise of their powers, the people always have a remedy in their hands; they may at any time restrain them by constitutional limitations. . . .

ST. JOSEPH STOCK YARDS CO. *v.* UNITED STATES. 298 U.S. 38 (1936).
MR. CHIEF JUSTICE HUGHES delivered the opinion of the court.

This suit was brought by St. Joseph Stock Yards Company to restrain the enforcement of an order of the Secretary of Agriculture fixing maximum rates for the Company's services. . . .

In October, 1929, the Secretary of Agriculture initiated a general inquiry into the reasonableness of appellant's rates. After hearing, the Secretary prescribed maximum rates which were enjoined by the District Court. . . . The Secretary reopened the proceeding and hearing was had in 1933. While the matter was under consideration, appellant filed in February, 1934, a petition for a further hearing. On May 4, 1934, the Secretary denied the petition and made the order now in question. . . .

[The Court is of opinion that the Secretary was "entitled" to examine such "a period of past operations as would enable him to make a fair prediction in fixing the maximum rates to be charged in the future," and that his findings adequately supported his order fixing these rates. The Court further agrees with the lower court that the test of experience should be applied to the rates fixed before the hearings are reopened. The opinion then proceeds:]

Third.—The scope of judicial review upon the issue of confiscation.

. . . .
A preliminary question is presented by the contention that the District Court, in the presence of this issue, failed to exercise its independent judgment upon the facts. . . . See *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287, 289; *Prendergast v. New York Telephone Co.*, 262 U.S. 43, 50; *Bluefield Water Works Co. v. Public Service Comm'n*, 262 U.S. 679, 689; *United Railways v. West*, 280 U.S. 234, 251; *Tagg Bros. & Moorhead v. United States*, [280 U.S. 420,] 443, 444; *Phillips v. Commissioner*, 283 U.S. 589, 600; *Crowell v. Benson*, 285 U.S. 22, 60; *State Corporation Comm'n v. Wichita Gas Co.*, 290 U.S. 561, 569. . . . The Government points out that . . . the court carefully analyzed the evidence, made specific findings of its own, and in addition adopted, with certain exceptions, the findings of the Secretary. . . .

. . . . The fixing of rates is a legislative act. In determining the scope of judicial review of that act, there is a distinction between action within the sphere of legislative authority and action which transcends the limits of legislative power. Exercising its rate-making authority, the legislature has a broad discretion. It may exercise that authority directly, or through the agency it creates or appoints to act for that purpose in accordance

with appropriate standards. The court does not sit as a board of revision to substitute its judgment for that of the legislature or its agents as to matters within the province of either. . . . When the legislature itself acts within the broad field of legislative discretion, its determinations are conclusive. When the legislature appoints an agent to act within that sphere of legislative authority, it may endow the agent with power to make findings of fact which are conclusive, provided the requirements of due process which are specially applicable to such an agency are met, as in according a fair hearing upon evidence and not arbitrarily. . . . In such cases, the judicial inquiry into the facts goes no further than to ascertain whether there is evidence to support the findings, and the question of the weight of the evidence in determining issues of fact lies with the legislative agency acting within its statutory authority.

But the Constitution fixes limits to the rate-making power by prohibiting the deprivation of property without due process of law or the taking of private property for public use without just compensation. When the legislature acts directly, its action is subject to judicial scrutiny and determination in order to prevent the transgression of these limits of power. The legislature cannot preclude that scrutiny and determination by any declaration or legislative finding. Legislative declaration or finding is necessarily subject to independent judicial review upon the facts and the law by courts of competent jurisdiction to the end that the Constitution as the supreme law of the land may be maintained. Nor can the legislature escape the constitutional limitation by authorizing its agent to make findings that the agent has kept within that limitation. Legislative agencies, with varying qualifications, work in a field peculiarly exposed to political demands. Some may be expert and impartial, others subservient. It is not difficult for them to observe the requirements of law in giving a hearing and receiving evidence. But to say that their findings of fact may be made conclusive where constitutional rights of liberty and property are involved, although the evidence clearly establishes that the findings are wrong and constitutional rights have been invaded, is to place those rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial safeguards. That prospect, with our multiplication of administrative agencies, is not one to be lightly regarded. It is said that we can retain judicial authority to examine the weight of evidence when the question concerns the right of personal liberty. But if this is so, it is not because we are privileged to perform our judicial duty in that case and for reasons of convenience to disregard it in others. The principle applies when rights either of person or of property are protected by constitutional restrictions. Under our system there is no warrant for the view that the judicial power of a competent court can be circumscribed by any legislative arrangement

designed to give effect to administrative action going beyond the limits of constitutional authority. This is the purport of the decisions above cited with respect to the exercise of an independent judicial judgment upon the facts where confiscation is alleged. . . .

But this judicial duty to exercise an independent judgment does not require or justify disregard of the weight which may properly attach to findings upon hearing and evidence. On the contrary, the judicial duty is performed in the light of the proceedings already had and may be greatly facilitated by the assembling and analysis of the facts in the course of the legislative determination. Judicial judgment may be none the less appropriately independent because informed and aided by the sifting procedure of an expert legislative agency. Moreover, as the question is whether the legislative action has passed beyond the lowest limit of the permitted zone of reasonableness into the forbidden reaches of confiscation, judicial scrutiny must of necessity take into account the entire legislative process, including the reasoning and findings upon which the legislative action rests. . . . The established principle which guides the court in the exercise of its judgment on the entire case is that the complaining party carries the burden of making a convincing showing and that the court will not interfere with the exercise of the rate-making power unless confiscation is clearly established. . . .

A cognate question was considered in *Manufacturers Ry. Co. v. United States*, 246 U.S. 457, 470, 488-490. There, appellees insisted that the finding of the Interstate Commerce Commission upon the subject of confiscation was conclusive, or at least that it was not subject to be attacked upon evidence not presented to the Commission. We did not sustain that contention. Nevertheless, we pointed out that correct practice required that "in all ordinary cases, and where the opportunity is open," all the pertinent evidence should be submitted in the first instance to the Commission. . . . And it was regarded as beyond debate that, where the Commission after full hearing had set aside a given rate as unreasonably high, it would require a "clear case" to justify a court, "upon evidence newly adduced but not in a proper sense newly discovered," in annulling the action of the Commission upon the ground that the same rate was so unreasonably low as to deprive the carrier of its constitutional right of compensation. With that statement, the Court turned to an examination of the evidence. The principle thus recognized with respect to the weight to be accorded to action by the Commission after full hearing applies *a fortiori* when the case is heard upon the record made before the Commission or, as in this case, upon the record made before the Secretary of Agriculture. It follows, in the application of this principle, that as the ultimate determination whether or not rates are confiscatory ordinarily rests upon a variety of subordinate or primary

findings of fact as to particular elements, such findings made by a legislative agency after hearing will not be disturbed save as in particular instances they are plainly shown to be overborne.

[The Court then turns to the findings of fact made before the Secretary and scrutinizes the property values involved, the value of land, the value of structures; the value of the business as a going concern; operating expenses; income; and rates for yarding livestock.]

We conclude that the appellant has failed to prove confiscation. . . .

MR. JUSTICE ROBERTS concurs in the result.

MR. JUSTICE BRANDEIS, concurring.

I agree that the judgment of the District Court should be affirmed; but I do so on a different ground.

The question on which I differ was put thus by the District Court: "If in a judicial review of an order of the Secretary his findings supported by substantial evidence are conclusive upon the reviewing court in every case where a constitutional issue is not involved, why are they not conclusive when a constitutional issue is involved? Is there anything in the Constitution which expressly makes findings of fact by a jury of inexperienced laymen, if supported by substantial evidence, conclusive, that prohibits Congress making findings of fact by a highly trained and especially qualified administrative agency likewise conclusive, provided they are supported by substantial evidence?"

Like the lower court, I think no good reason exists for making special exception of issues of fact bearing upon a constitutional right. The inexorable safeguard which the due process clause assures is not that a court may examine whether the findings as to value or income are correct, but that the trier of the facts shall be an impartial tribunal; that no finding shall be made except upon due notice and opportunity to be heard; that the procedure at the hearing shall be consistent with the essentials of a fair trial; and that it shall be conducted in such a way that there will be opportunity for a court to determine whether the applicable rules of law and procedure were observed. . . .

To learn what the procedure must be in a particular situation, in order to constitute due process, we turn necessarily to the decisions of our Court. These tell us that due process does not require that a decision made by an appropriate tribunal shall be reviewable by another. . . . They tell us that due process is not necessarily judicial process. . . . And they draw distinctions which give clear indication when due process requires judicial process and when it does not.

The first distinction is between issues of law and issues of fact. . . . The second distinction is between the right to liberty of person and other

constitutional rights. . . . They show that due process of law does not always entitle an owner to have the correctness of findings of fact reviewed by a court. . . .

Our decisions tell us specifically that the final ascertainment of the facts regarding value or income may be submitted by Congress, or state legislatures, to an administrative tribunal, even where the constitutionality of the taking depends upon the value of the property or the amount of the net income. . . .

These cases show that in deciding when, and to what extent, finality may be given to an administrative finding of fact involving the taking of property, the Court has refused to be governed by a rigid rule.

Congress concluded that to give finality to the findings of the Secretary of Agriculture of the facts as to value and income is essential to the effective administration of the Packers and Stockyards Act. . . .

The history of the case illustrates that regulation cannot be effective unless the legality of the rates prescribed may, if contested, be determined with reasonable promptness. Six and one-half years have elapsed since the Secretary of Agriculture concluded that the rates of this utility were so high as to justify enquiry into their reasonableness, and nearly two years since entry of his order prescribing the reduced rates. In the judgment of the lower court and of this Court the attack upon the order reducing them was unwarranted. But the rates of 1929 have remained in force; and, despite the supersedeas and injunction bonds, there will be practically no redress for the wrong done to the business community throughout the long years in which excessive rates have been exacted. Neither party is chargeable with lack of diligence in the investigation or litigation; and there is no suggestion of undue delay on the part of either court. The long delay is due to other causes. . . .

Sixth. The abstract of record made before the Secretary and submitted to the District Court for review consisted of 1648 printed pages of evidence, besides 111 exhibits, many being extensive. Twenty-two witnesses testified orally. The 71 exhibits certified to the Court alone comprise 1358 pages of tabulations or like detail. In addition they contain 18 graphs, 30 maps or photographs, and 600 pages of reading matter. . . . The condensed narrative statement of the evidence other than exhibits fills 721 pages of the printed record in this Court. Seventy-one exhibits . . . were required to be transmitted to this Court as a part of the record before us. The number of pages of the evidence (including exhibits) before us bearing more or less specifically upon the question of confiscation is 2717. The total number of pages—briefs, exhibits, and evidence—before this Court is 3466.

The magnitude of the task involved in a judicial review which requires a determination by the Court, in its independent judgment, of

the correctness of the findings of fact as to value and income which the Secretary made, cannot be measured by looking alone at the volume of the evidence. The multiplicity of the issues, and the character of the evidence bearing on them respectively, impose a peculiar burden. The findings as numbered and lettered by the Secretary total 215. The number of determinations of fact bearing upon confiscation involved in these findings is, roughly, 250, as gathered from the 108-page opinion of the Secretary. To decide whether any one of these 250 determinations of fact alleged to be erroneous is, or is not, correct, involves separate examination of the evidence relating specifically to it; since as to each of these determinations the reviewing court is called upon to make a decision, in the exercise of an independent judgment. Such a decision involves, in many cases, weighing specific evidence and resolving conflicts.

(a) There is controversy as to the extent to which property owned by the Company is used or useful. That enquiry relates to 52 different items. The testimony and exhibits bearing upon this issue occupy 194 pages. On it there are approximately 50 findings. The correctness of only one of these is controverted here.

(b) There is controversy as to the value of the land. It consists of 60 different tracts. The testimony and exhibits bearing upon their value occupy 596 pages (the exhibits number 20). On this issue there are about 10 findings. The correctness of 3 is controverted here, dealing with the land in a single zone.

(c) There is controversy as to the value of the structures. It deals with reproduction costs; it requires separate consideration of materials and labor, of overheads and depreciation. The testimony and exhibits occupy 629 pages (the exhibits number 12). On these issues there are some 40 findings. Those dealing with depreciation are controverted here.

(d) There is controversy as to going concern value. The testimony and exhibits on this issue occupy 113 pages. The Secretary decided that no separate allowance should be made. That conclusion is controverted here.

(e) There are controversies as to the estimated income, as to the expenses, and as to charges. The testimony and exhibits bearing upon them occupy, in the aggregate, 663 pages (the exhibits number 42). On these issues there are approximately 140 determinations. Of these about 50 seem to be controverted here.

In deciding whether the Constitution prevents Congress from giving finality to findings as to value or income where confiscation is alleged the Court must consider the effect of our decisions not only upon the function of rate regulation, but also upon the administrative and judicial tribunals themselves. Responsibility is the great developer of men. May it not tend to emasculate or demoralize the rate-making body if ultimate

responsibility is transferred to others? To the capacity of men there is a limit. May it not impair the quality of the work of the courts if this heavy task of reviewing questions of fact is assumed?

The obstacles encountered in the case at bar and in the regulation of the rates of large utilities are attributable, in the main, to the Court's adherence to the rule declared in *Smyth v. Ames* for determining the value of the property. In *Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Comm'n*, 262 U.S. 276, 289, I stated my reasons for believing that the Constitution did not require the Court to adopt that rule which so seriously impairs the power of rate-regulation. But since the decision of *Smyth v. Ames* is adhered to, there is the greater need of applying to cases in which rate-regulation is alleged to be confiscatory the rule of reason under which the Court has sanctioned, in other cases of taking, the legislative provision giving finality to quasi-judicial findings of value and income by administrative tribunals.

. . . . Congress concluded that a wealthy and litigious utility might practically nullify rate regulation if the correctness of findings by the regulating body of the facts as to value and income were made subject to judicial review. For that conclusion experience affords ample basis. I cannot believe that the Constitution, which confers upon Congress the power of rate-regulation, denies to it power to adopt measures indispensable to its effective exercise.

MR. JUSTICE STONE and MR. JUSTICE CARDOZO concurring in the result:

We think the opinion of Mr. Justice Brandeis states the law as it ought to be, though we appreciate the weight of precedent that has now accumulated against it. If the opinion of the Court did no more than accept those precedents and follow them, we might be moved to acquiesce. More, however, has been attempted. The opinion reexamines the foundations of the rule that it declares, and finds them to be firm and true. We will not go so far. . . . If the challenged doctrine is to be reconsidered, we are unwilling to approve it. . . .

NOTE ON THE RULE OF *SMYTH v. AMES*

The rule of *Smyth v. Ames* referred to by Mr. Justice Brandeis is laid down in the following statement: "We hold, however, that the basis of all calculations as to the reasonableness of rates to be charged (by a public service or public utility) corporation . . . must be the fair value of the property being used by it for the convenience of the public. And in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market

value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration" *Smyth v. Ames*, 169 U.S. 466 (1898), 546.

Mr. Justice Brandeis' criticism of this rule is, in part, that it is "legally and economically unsound. The thing devoted by the investor to the public use is not specific property, tangible and intangible, but capital embarked in the enterprise. Upon the capital so invested the Federal Constitution guarantees to the utility the opportunity to earn a fair return. . . . The Constitution does not guarantee to the utility the opportunity to earn a fair return on the value of all items of property used by the utility, or any of them. . . . Cost includes not only operating expenses, but also capital charges. Capital charges cover the allowance, by way of interest, for the use of the capital, whatever the nature of the security issued therefor; the allowance for risk incurred; and enough more to attract capital. The reasonable rate to be prescribed by a commission may allow an efficiently managed utility much more. But a rate is constitutionally compensatory, if it allows to the utility the opportunity to earn the cost of the service as thus defined." *Idem.*, p. 590.

During a course of lectures delivered at Columbia University in 1928, Mr. Charles Evans Hughes referred to the Brandeis dissent thus: "In recent years, when cost of reproduction has mounted so high, there has been an effort, as yet unsuccessful, to establish what is called 'the prudent investment value' as the basis of determining the fair value."¹⁷ The *St. Joseph Stock Yards* case was decided eight years later. Mr. Hughes was then Chief Justice; the other members of the Court were Van Devanter, McReynolds, Sutherland, Butler and Roberts in the conservative wing, with Brandeis, Stone and Cardozo in the liberal group. President Roosevelt nominated Senator Black to the Supreme Court on August 12, 1937, to fill the vacancy created by the resignation of Van Devanter. Senator Black had been an outstanding champion of President Roosevelt's policies in the Senate, and the confirmation which followed increased the left-wing group on the Court by one member. Thus began the now celebrated series of Roosevelt appointments, and the corresponding reorientation in the Court's habits of thought. Whether the resulting alteration of view will point the Court towards a reconsideration of *Smyth v. Ames* is a matter for observation by the student of the tribunal's doctrines. The Brandeis line of attack on the case was continued by Black in 1938 in *McCary v. Indianapolis Water Co.*, 302 U.S. 419, and by Frankfurter in the following year in *Driscoll v. Edison Light & Power Co.*, 307 U.S. 104. In 1938 also, the Court showed for the first

¹⁷ *The Supreme Court of the United States* (Garden City, 1936), p. 220.

time sympathetic regard for the prudent investment theory, in *Railroad Commission of California v. Pacific Gas & Electric Co.*, 302 U.S. 388.

BIBLIOGRAPHICAL NOTE

Henry W. Edgerton, *The Incidence of Judicial Control over Congress*, 22 *Cornell L. Q.* 299 (1937) contains an analysis of the cases up to 1932 where the Supreme Court has voided Acts of Congress. The article is directed towards ascertaining the effect of these decisions upon different social groups. Sections VII and VIII are germane here.

Oliver P. Field, *Judicial Review as an Instrument of Government*, being chapter XII of his book, *The Effect of an Unconstitutional Statute*, University of Minnesota Press, 1935, directs attention to the judicial review of administrative tribunals. He maintains the Brandeis point of view.

Henry W. Bikle, "Judicial Interpretation of Facts Affecting the Constitutionality of Legislative Action," 38 *Harvard L. R.* 6 (1924) is a broad study of the Court's fact-finding function.

An editorial Note in 29 *Columbia L. R.* 1140 (1929) deals with the effects of delay in rate cases.

ASHWANDER *v.* TENNESSEE VALLEY AUTHORITY, 297 U.S. 288, 341, 435 *et seq.* (1936). MR. JUSTICE BRANDEIS, concurring. . . .

The Court has frequently called attention to the "great gravity and delicacy" of its function in passing upon the validity of an act of Congress; and has restricted exercise of this function by rigid insistence that the jurisdiction of federal courts is limited to actual cases and controversies; and that they have no power to give advisory opinions. . . .

The Court developed, for its own governance . . . , a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision. They are:

1. The Court will not pass upon the constitutionality of legislation in a friendly, non-adversary, proceeding, declining because to decide such questions "is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy between individuals. It was never thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act." *Chicago & Grand Trunk Ry. v. Wellman*, 143 U.S. 339, 345. . . .

2. The Court will not "anticipate a question of constitutional law in advance of the necessity of deciding it." *Liverpool, N.Y. & P. S. S. Co. v. Emigration Commissioners*, 113 U.S. 33, 39; *Abrams v. Van Schaick*, 293 U.S. 188; *Wilshire Oil Co. v. United States*, 295 U.S. 100. "It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case." *Burton v. United States*, 196 U.S. 283, 295.

3. The Court will not "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Liverpool, N. Y. & P. S. S. Co. v. Emigration Commissioners, supra.* . . .

4. The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. This rule has found most varied application. Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter. *Siler v. Louisville & Nashville R. Co.*, 213 U.S. 175, 191; *Light v. United States*, 220 U.S. 523, 538. Appeals from the highest court of a state challenging its decision of a question under the Federal Constitution are frequently dismissed because the judgment can be sustained on an independent state ground. *Berea College v. Kentucky*, 211 U.S. 45, 53.

5. The Court will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation. *Tyler v. The Judges*, 179 U.S. 405; *Hendrick v. Maryland*, 235 U.S. 610, 621. . . .

6. The Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits. *Great Falls Mfg. Co. v. Attorney General*, 124 U.S. 581. . . .

7. "When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Crowell v. Benson*, 285 U.S. 22, 62.

To Mr. Justice Brandeis' list, for present purposes, there should be added:

8. "If any act of Congress, or of the legislature of a state, violates those constitutional provisions, it is unquestionably void; though, I admit, that as the authority to declare it void is of a delicate and awful nature, the Court will never resort to that authority, but in a clear and urgent case." Iredell, J., in *Calder v. Bull*, 3 Dall. 386, 399. *Dartmouth College v. Woodward*, 4 Wheat. 518, 625. *Sinking-Fund Cases*, 99 U.S. 700, 718. "But if I could rest my opinion in favor of the constitutionality of the law on which the question arises, on no other ground than this doubt so felt and acknowledged, that alone would, in my estimation, be a satisfactory vindication of it. It is but a decent respect due to the wisdom, the integrity, and the patriotism of the legislative body, by which any law is passed, to presume in favor of its validity, until its violation of the constitution is proved beyond all reasonable doubt." Washington, J., in *Ogden v. Saunders*, 12 Wheat. 213, 270.

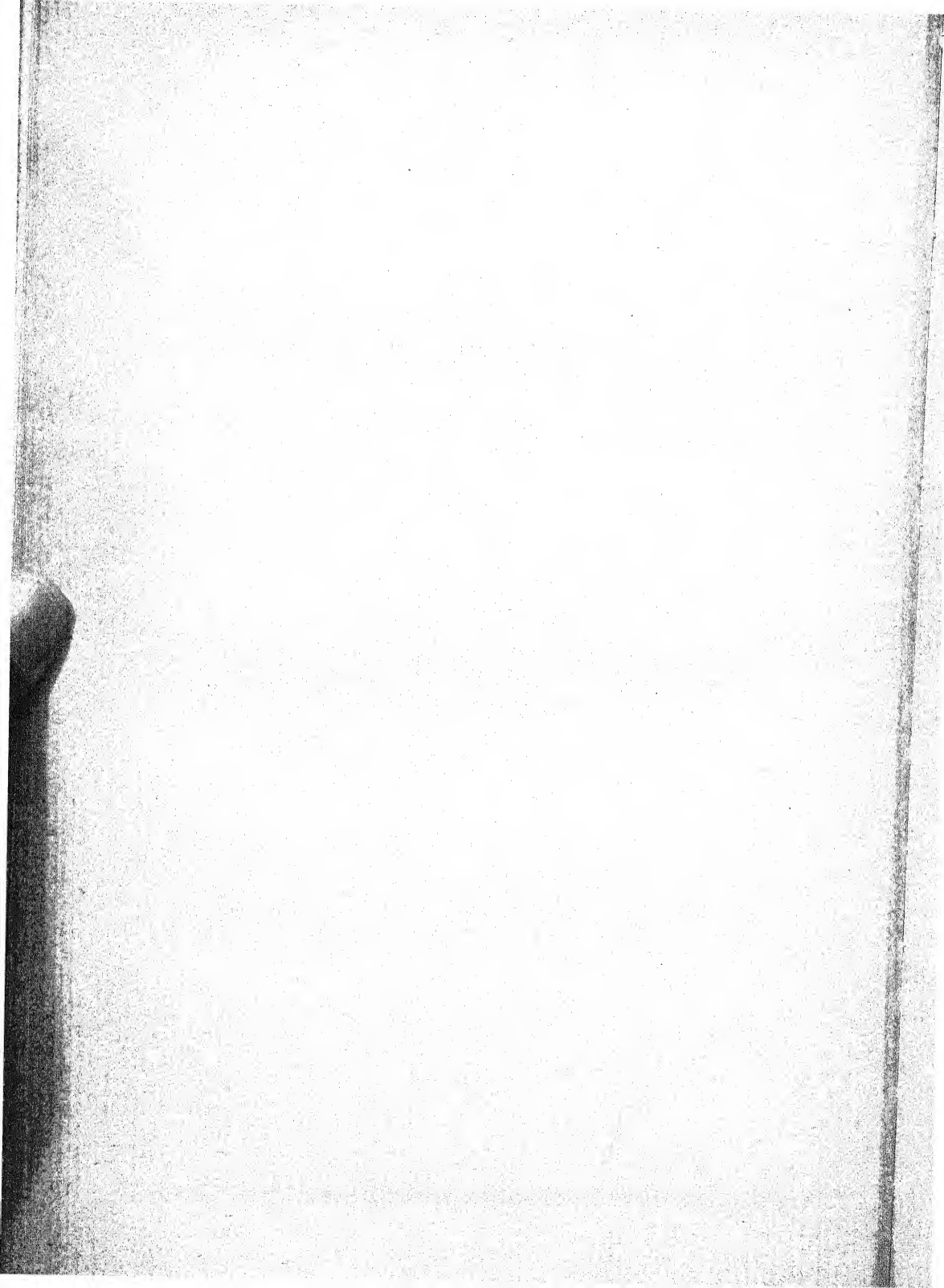
9. "When the classification made by the legislature is called in ques-

tion, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of the existence of that state of facts, and one who assails the classification must carry the burden of showing by a resort to common knowledge or other matters which may be judicially noticed, or to other legitimate proof, that the action is arbitrary." *Borden's Farm Products Co. v. Baldwin*, 293 U.S. 194, 209. See a valuable editorial Note, *The Presumption of Constitutionality Reconsidered*, 36 Columbia Law Review, 283 (1936). The writer quotes in footnote 36 a pertinent observation of Mr. Justice Holmes, that . . . "there are many things that courts would notice if brought before them that beforehand they do not know. It rests with counsel to take the proper steps, and if they deliberately omit them, we do not feel called upon to institute inquiries on our own account." *Quong Wing v. Kirkendall*, 223 U.S. 59, 64. With the editorial Note should be read Albert M. Kales, *New Methods in Due Process Cases*, 12 American Political Science Review, 241 (1918).

10. "If by the statement that what the Constitution meant at the time of its adoption it means today, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation." *Home Building and Loan Association v. Blaisdell*, 290 U.S. 398, 442-443. Edward S. Corwin, *Judicial Review in Action*, 74 University of Pennsylvania Law Review, 639 (1928) is important for an analysis of the Court's methods and an appraisal of the Court's function growing therefrom, in its exercise of review.

PART II

The Great Concepts of the Constitution



CHAPTER II

Political Liberty

NATURAL RIGHTS

Thomas Jefferson epitomized the doctrine of Natural Rights in that celebrated manifesto, the Declaration of Independence. The pertinent parts of it read as follows:

When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, . . . they should declare the causes which impel them to separation.

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed. That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their safety and Happiness. . . .

This is a paraphrase¹ of the theory of John Locke:

Men being, as has been said, by nature all free, equal, and independent, no one can be put out of this estate and subjected to the political power of another without his own consent, which is done by agreeing with other men, to join and unite into a community for their comfortable, safe, and peaceable living . . . in a secure enjoyment of their properties. . . .²

Man being born, as has been proved, with a title to perfect freedom and an uncontrolled enjoyment of all the rights and privileges of the law of Nature, equally with any other man, . . . hath by nature a power not only to preserve his property—that is, his life, liberty, and estate, against the injuries and attempts of other men, but to judge of and punish the breaches of that law in others. But because no political society can be, nor subsist, without having in itself the power to preserve the property, and in order thereunto punish the offences of all those of that society, there, and there only, is political society where every one of the members hath quitted this natural power, resigned it up into the hands of the community. . . .³

¹ The fact is well known. Benjamin F. Wright, Jr., *American Interpretations of Natural Law* (Cambridge, 1931), p. 10; Carl Becker, *The Declaration of Independence* (New York, 1922), p. 27.

² *Second Treatise on Civil Government*, ch. VIII, sec. 95.

³ *Ibid.*, ch. VII, sec. 87.

Because American theories of natural rights have been predominantly Lockian, two other extracts from the same essay may be appended here:

The great and chief end, therefore, of men uniting into commonwealths, and putting themselves under government, is the preservation of their property. . . .⁴

A man having, in the state of Nature, no arbitrary power over the life, liberty, or possession of another, but only so much as the law of Nature gave him for the preservation of himself and the rest of mankind, this is all he doth, or can give up to the commonwealth, and by it to the legislative power, so that the legislative power can have no more than this. Their power in the utmost bounds of it is limited to the public good of the society. It is a power that hath no other end but preservation . . . ; the obligations of the law of Nature cease not in society, but only in many cases are drawn closer, and have, by human laws, known penalties annexed to them to enforce their observation. Thus the law of Nature stands as an eternal rule to all men, legislators as well as others. The rules that they make for other men's actions must, as well as their own and other men's actions, be conformable to the law of Nature—*i.e.*, to the will of God, of which that is a declaration, and the fundamental law of Nature being the preservation of mankind, no human sanction can be good or valid against it.⁵

It will be observed that Locke here makes the transition from natural right to natural law, but it is not clear what the relationship between them is. Only one idea seems definite, namely, that natural law is paramount over legislation (statutory law). The whole idea, however,—the conception of a universal status of equality, the possession of inherent rights which not only are legally enforceable but act as a guaranty of freedom—issued in American constitutionalism in the principle of the equal protection of the laws.⁶ Furthermore, the same complex of ideas coupled with the proposition that they form a body of fundamental rights which are a barrier to the power of government have been judicially incorporated in the Constitution as essential elements of due process.⁷

It is a part of the theory of democracy that every free citizen of a parliamentary state is endowed with an equipment of rights inviolable by government. Concern here is not with the origin of these rights, but with their existence. Their number is neither known nor is it constant. It is not even ascertainable whether the total number of rights is increasing or diminishing. The conditions of living defeat tabulation. The term "natural rights" has survived the doctrine which created it. Civil liberties are called natural rights now because they are traditional and familiar,

⁴ Ch. IX, sec. 124.

⁵ Ch. XI, sec. 135.

⁶ "An insistent and fertile concept." Charles Grove Haines, *The Revival of Natural Law Concepts* (Cambridge, 1930), p. 58.

⁷ Haines, *ibid.*, p. 175; Wright, *op. cit.*, pp. 298-299.

or because they are appropriate to the exercise of the status of free citizenship in a democratic state. The attribute of inviolability has persisted, too, although both its support and its substance have been transformed by modern experience. There is now no law acknowledged to be superior to the sovereign will of the people, so that government is not thought to be restricted by a power above and beyond the public will. Consequently, not only are such rights dependent for their sanction upon the authority which secures them, but their force and effect are also determined by the same source. The existence of civil rights and the protection of them under the forms of law convey that sense of inviolability attaching to them when they were thought to be inherent in the nature of man. This inviolability is preserved for those rights held to be essential to the conduct of government under democratic institutions.

Democracy postulates both the dignity of man and a free society. But the coöperation of free men is a condition essential to the orderly management of community living. The individual can not assert his own rights in defiance of the social interest. The particularism characteristic of the doctrine of natural rights was based upon a philosophy of government which no longer obtains credence—the view that government is a necessary evil and should therefore be restricted to the narrow bounds of protecting property and maintaining order. But however remote from the political life of today this philosophy may seem, it was congenial to American society for the first hundred years of the constitutional republic. The settlement of the continent had been carried on under conditions which approximated a state of nature. Existence molded by pioneer necessities had developed resourcefulness in individuals and had given first place to their independence, equality, and capacity for self-reliance; it had, at the same time, demonstrated the necessity for some sort of commonwealth, some political society, so that coöperation and mutual help could be developed peaceably. Later on, the increasingly determined efforts of the British Government to regulate colonial life fostered a sense of irritation at external control. The conflict of British policy with American interests, imposed on the simplicity of the economic and political habits of the people, together generated a (native) distrust not only of much government but of all government. The translation of this psychology into juristic terms was stimulated by the exigencies of controversy which the move for separation from the mother country engendered. The period of constitution-making which followed the Declaration of Independence seemed a ratification of the theory that political society was originated by a social compact. And the characteristics of continental life shaped a definition of the ends of government. These ideas persisted. After the Civil War, when an intense industrial life fairly sprouted, they were carried over into the economic realm, so that they

influenced—indeed, they controlled—the relation of governmental policy to private enterprise. A prolonged period of readjustment followed.

That government may step in to restrain personal conduct at the point where it is inimical to the public welfare had always been admitted in principle by everyone. But the best that the liberal individualistic philosophers had been able to do was to cite drunkenness and prostitution as examples of behavior calling for interference by society. The area of social control was minimized and left vague. But the last thirty years of the nineteenth century (in America) covered a period in the expansion and organization of capitalist economy which brought this problem to an issue. Private initiative collided with the public interest. State legislatures first, and then Congress, undertook regulation of the corporate business of the day. The laws which followed were attacked with arguments drawn from traditional American ideology as violations of the American way of life.⁸ The attack was easier to manage than the defense. To work out a constitutional justification of such regulation, it was necessary to sustain a concept of government which was alien to American doctrine: the view that government acts primarily not to protect the individual but to foster the well-being of the whole society. This battle had to be fought out ultimately in the federal Supreme Court. The fortunes of the two interests concerned ebbed and flowed with the decisions; and, on the whole, governmental regulation was accorded but slow and reluctant support.⁹ Angered liberal critics of the Court were inclined

⁸ The use of this descriptive phrase here is, of course, an anachronism.

⁹ The intercurial conflict runs from the *Slaughter House Cases*, 16 Wall. 36 to *West Coast Hotel Co. v. Parrish*, 300 U.S. 379. The dates run from 1872 to 1937, inclusive, a period of 65 years. This is not to say that controversy was stilled in the latter year. What happened in 1937 was that the Supreme Court formally placed the individual and his property rights secondary to the social welfare and recognized government as the agent of the whole community.

This distinction can be pointed by a comparison of two minimum wage cases. The first one is *Adkins v. Children's Hospital*, 261 U.S. 525, decided in 1924. A Minimum Wage Board for the District of Columbia had been set up by congressional enactment and empowered to ascertain and to declare standards of minimum wages for women and minors employed in the District. This standard was to be fixed by estimating the necessary cost of living and the income required to maintain the health and good morals of female employees. Mr. Justice Sutherland, speaking for a divided Court, argued this way:

"That the right to contract about one's affairs is a part of the liberty of the individual protected by (the guaranties of the due process clause of the Fifth Amendment) is settled by the decisions of this Court and is no longer open to question. . . .

"The standard furnished by the statute for the guidance of the board is so vague as to be impossible of practical application with any reasonable degree of accuracy. . . .

"The law takes account of the necessities of only one party to the contract. It ignores the necessities of the employer by compelling him to pay not less than a certain sum, not only whether the employee is capable of earning it, but irrespective of the ability of his business to sustain the burden, generously leaving him, of course, the privilege of abandoning his business as an alternative for going on at a loss. . . .

"The feature of this statute which, perhaps more than any other, puts upon it the

to attribute this disapproval to moral turpitude. The explanation was, however, that the judiciary was defending the ideals with which the country had grown up and had achieved greatness. The truth was that the liberalism of the past had become the conservatism of the present. In covering the doctrines of *laissez faire* economics with the sanctity of nineteenth century individualism, the Supreme Court was also shielding with its authority the malpractice of Big Business.

The catastrophic depression of the thirties prostrated the entire nation. Public opinion demanded the intervention of government on a

stamp of invalidity is that it exacts from the employer an arbitrary payment for a purpose and upon a basis having no causal connection with his business. . . .

"It has been said that legislation of the kind now under review is required in the interest of social justice, for whose ends freedom of contract may lawfully be subjected to restraint. The liberty of the individual to do as he pleases, even in innocent matters, is not absolute. It must frequently yield to the common good, and the line beyond which the power of interference may not be pressed is neither definite nor unalterable. . . . But, nevertheless, there are limits to the power. . . . To sustain the individual freedom of action contemplated by the Constitution, is not to strike down the common good but to exalt it; for surely the good of society as a whole cannot be better served than by the preservation against arbitrary restraint of the liberties of its constituent members."

The other case is that of the *West Coast Hotel*, noted above. Closely similar legislation was under consideration. Mr. Chief Justice Hughes, speaking the opinion of a Court likewise divided, sustained the challenged legislation by postulating a new definition of liberty:

"The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. . . . Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals, and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process."

Then, expressly overruling the *Adkins Case*, the Chief Justice proceeds to elaborate the new point of view (though, after the manner of courts, he argues that nothing new is being said):

"We think that the views thus expressed are sound and that the decision in the *Adkins Case* was a departure from the true application of the principles governing the regulation by the state of the relation of employer and employed. . . .

"The Legislature of the state was clearly entitled to consider the situation of women in employment, the fact that they are in the class receiving the least pay, that their bargaining power is relatively weak, and that they are the ready victims of those who would take advantage of their necessitous circumstances. The Legislature was entitled to adopt measures to reduce the evils of the "sweating system," the exploiting of workers at wages so low as to be insufficient to meet the bare cost of living, thus making their very helplessness the occasion of a most injurious competition. . . .

"What these workers lose in wages the taxpayers are called upon to pay. The bare cost of living must be met. We may take judicial notice of the unparalleled demands for relief which arose during the recent period of depression and still continue to an alarming extent despite the degree of economic recovery which has been achieved. . . . The community is not bound to provide what is in effect a subsidy for unconscionable employers. . . ."

scale without precedent, even to the organized support of the economic life of the people. The Supreme Court was confronted with legislation vast in its effect upon propertied interests. The very structure of the government was altered to provide for the new services which the times demanded. At first, conventional judicial doctrine prevailed, and the Court invalidated much of the early New Deal legislation. But the crisis was too acute for the Court to withstand it; the scope of the New Deal program became so broad that the Court dared not take responsibility for nullifying it.¹⁰

Areas of activity traditionally regarded as closed to governmental regulation have been endowed with social significance by the force of circumstances, and, under pressure of popular distress, barriers formerly existing against governmental supervision have collapsed, so that an individual may no longer invoke his personality to save himself from regulation. Government is now looked upon as an instrument for the service of the people. Indeed, the habit of invoking government in the name of collective human rights has become familiar.

The first eight amendments to the Constitution contain those rights traditionally precious to Englishmen. Their possession has always been regarded as a guaranty against tyranny, for they were exacted by the threat of force from resistant monarchs. Their preservation has been held essential to the maintenance of democratic institutions wherever the English inheritance has been planted. That they should appear in the Constitution was in accordance with tradition also, for it was the English practice to embody these rights in laws. The Magna Carta, the Bill of Rights of 1689, the common law itself, and the various charters and constitutions which established the colonies—all were precedents for the formal enactment of these rights into fundamental law. They were the keystones of liberty; they indicated the people's fear of the power of government; they represented, also, the bargain which had been made from time immemorial between a valiant people and sovereignty—the terms on which alone the consent of the governed could be obtained; and they revealed the distrust of the new federal government which the earlier Revolutionary leaders felt, and which they inculcated in the mass of the people of the states.

But the development of the Union into a nation-state, and the organization of an industrial society have developed new values and reduced to obsolescence many of the old ones. One, now, more than all the others, is cherished vigilantly as the foundation of democratic government—the right of free discussion. Free speech, free assembly, and freedom of the press have come to be thought indispensable to a free society. Other

¹⁰ Edward S. Corwin, *Constitutional Revolution, Ltd.* (Claremont, Calif., 1941), ch. II, *passim*, but especially pp. 43 and 76.

values have been created, new rights established, which are the outgrowth of the American experience. These are not specifically provided for by the Constitution, but owe their presence there to the judicial power. They are to be found in the judicial construction of the due process of law clauses of the Fifth and Fourteenth Amendments. While the concept of due process is itself a check against arbitrary government, the substance of due process has proved to be variable. The clause has accommodated current philosophy and the judicial notions of fairness and justice which have from time to time dominated the Supreme Court. It has preserved individual rights beyond the time when they possessed reality, and it has received and validated unprecedented legislation restricting private behavior in the interest of the public welfare. But whether it has retarded or furthered progressive legislation, it has been the constitutional device for keeping the Bill of Rights up to date.

If there is a unifying principle giving coherence to the modern concept of natural rights, it is that of the equal protection of the laws, or political and civil equality. The tensions of the economic struggle have made equality of status more important than liberty of action. During the period between the adoption of the Fourteenth Amendment and the outbreak of the first World War, the Supreme Court developed the doctrine that unreasonable legislative discrimination between persons or classes of persons (including corporations) is unconstitutional as a failure of equal protection. Toward the end of the period the Court showed a marked tendency to identify equal protection with due process, and discrimination with a lack of due process. Throughout the twenties, doctrine rested there; but with the coming of the universal depression of the thirties, the Supreme Court returned to the subject. In an almost revolutionary line of cases, it upheld legislation designed to create an equality of power between the employer and the employed, to furnish work to those dependent for their subsistence on their labor, and to provide economic security for the very poor. While much of this legislation was not different in principle from similar remedial legislation of the past, there was much that was motivated by a new ideology, by the belief that the economically underprivileged were deprived of rights which belonged to them, and which government should protect. The distinction between a privilege and a right was treated as academic. The presence of demonstrated weakness was made the test of deprivation, and deprivation indicated the existence of rights not possessed. As soon as the Supreme Court was able to reason that rights or privileges not possessed ought to be possessed, the sanction of the Constitution was secured for the new philosophy.

Besides having become a reservoir for those modern rights which are thought vital to the preservation of democracy, the concept of due

process has been made to discharge another function, that of extending the traditional body of rights to the states. The first eight amendments to the Constitution of the United States limited only the powers of Congress. It is true that the practice of attaching to state constitutions bills of rights was prevalent. But the practice was neither universal nor uniform. Furthermore, the boundaries to the proper exercise of these rights was a matter for judicial construction within each separate state. Whether or not the extension of the federal bill of rights to the states was in the minds of the framers of the Fourteenth Amendment, the Supreme Court of the United States so construed it.

Some rough classification of these rights is implied by the course of their development and by the technique of the constitutional protection secured to their exercise. The following division is one among others which will serve to place them in relation to each other: (1) traditional rights safeguarding individual activity; (2) rights securing to the individual a fair trial in open court; (3) collective rights necessary to the social well-being, but restrictive of the free exercise of individual rights. In the cases to come, the first division is entitled "Fundamental Rights of the Individual." Here are placed modern applications of the guaranties of civil liberties. Running through the opinions is a sense of the urgency of public control, a recognition that the simple application of a principle of natural right is no longer fitting to a complicated industrial society¹¹ where time-honored conduct may have harmful social effects.

The second division is indicated by the short title, "Access to the Courts." The right to an impartial hearing and its concomitant, a fair trial, is an ancient and jealously prized liberty in the English tradition. It has been absorbed in American constitutional law as procedural due process. The cases reproduced here develop the most important elements of the conception of a fair trial.

The creation by Congress of a very important group of administrative agencies exercising jurisdiction similar to that of the judiciary is noted also. These boards and commissions have a quasi-judicial function in

¹¹ Cushman points out that American interest in civil liberties is diminishing. He indicates the surrender of specific rights in the censorship of books and the theatre; in the schools (evolution and modern languages); in the breaking up of unwelcome public speeches; in the federal immigration laws; in the "blue sky" laws enforcing particular views of morality. *Encyclopaedia of the Social Sciences*, article on Civil Liberties, Vol. III, p. 511. He says forthrightly that there is no guaranty in democracy itself of any group of individual liberties.

Ernst Freund notes that the furtherance of private interests is now dependent upon the good will of the state, and holds that to this extent the ancient liberties are inhibited. He argues that the freedom of the press depends upon permission to use the mails, and that freedom of expression may sometime depend upon the state's control of broadcasts; that the right to bear arms has lost its real meaning, since the use of machine guns and gas is not permitted to private persons. See his article in the *Encyclopaedia*, "Constitutional Law," vol. IV, p. 252.

that they apply administrative law. They are sometimes called legislative courts.

The third division appears in the cases under the caption, "Equal Protection of the Laws." The reason for the selection of this title is in part that it is a familiar phrase in American constitutionalism, and in part that it delineates a fundamental democratic principle—that government is by the people for the people. Its connection with collective rights may not be apparent at once. The thought is this: People become assimilated or associated into groups and classes whenever they possess marked traits in common which set them off from most of the people, or when they have some incentive to united action. Familiar examples taken at random are Communist or Fascist organizations; negroes; union labor; business concerns like interstate trucking companies, chain stores, or insurance companies. All of these groups have at one time or another been the target of discriminatory legislation and popular antagonism. Individuals within such groups are not penalized or handicapped because of their personalities, but because of their membership in the group. When they seek defense under the principle of the equal protection of the laws, they are seeking a status for the group; they are urging a collective right, a right for the group or class. So, for example, Labor asserts a right to collective bargaining, and the negro race claims a right to the same opportunities for education which the white race enjoys.

The cases in this section do hardly more than indicate the principle of collective rights. Its further development must be left for later chapters. Meanwhile, it is sufficient to become acquainted with the judicial construction of the equal protection clause of the Fourteenth Amendment.¹²

¹² This whole subject of Rights has penetrating implications in the economic and societal spheres as well as in that of the jurist. The trend of the discussion presented here indicates, it is evident, that there has been a transmutation of the concept of personal rights as possessed by moral, free-willing individuals into a concept of collective, social rights, possessed by persons who are members of an organized group in society (or, perhaps, by persons who are a group in an organized society). This development seems to have been channelled in constitutional law through an ever-widening expansion of the concept of property as it occurs in the due process clause of the Fifth and Fourteenth Amendments. Thus, the right to offer certain wages for the doing of a certain job is not the personal right of a free man, but a property right embraced in the term liberty. Or again, the right to work, if it be a right, is not one which appertains to a human being by the mere fact that he is a human being, but, rather, it is a social right, derived from an imperative under which society exists; and it is vested in the individual members of this society as a property right. The right of a man to a reasonable return on his investment is not an ethical right, but a property right. The right to a decent standard of living is an ethical or socio-ethical right, but its establishment is effectuated through treating it as a property right. And examples might be multiplied.

Further pursuit of this idea leads from the pathway of this book and so must not be undertaken. Yet it will be rewarding to the student to keep the idea in mind during the analysis of the cases on due process and on the state and federal police

The twin essentials of due procedure, that is, access to the courts and a fair trial after the accused gets there, are over-simplified by their statement in the opinions. In specific cases, the application of these principles or the definition of the terms used to state them may have the effect of broadening the concept of due process beyond the matter of the mechanics of judicial settlement to include substantive notions as to how justice may best be done to the parties concerned. For example, in the famous *Scottsboro Case* the court took a broad view of due process as embracing fundamental rights not protected by the common law.

Freedom of Assembly

WHITNEY v. CALIFORNIA.

Supreme Court of the United States. 1927.
274 U.S. 357.

MR. JUSTICE SANFORD delivered the opinion of the court.

By a criminal information filed in the Supreme Court of Alameda County, California, the plaintiff in error was charged, in five counts, with violations of the Criminal Syndicalism Act of that State. . . . She was tried, convicted on the first count, and sentenced to imprisonment. The judgment was affirmed by the District Court of Appeals. . . . Her petition to have the case heard by the Supreme Court was denied. . . . And the case was brought here on a writ of error. . . .

On the first hearing in this Court, the writ of error was dismissed for want of jurisdiction. 269 U.S. 530. Thereafter, a petition for rehearing was granted . . . and the case was again heard and reargued both as to the jurisdiction and the merits.

power. "The Anglo-American analytical jurists, who set the models in juristic thinking, were real-property lawyers and thought of the law in terms of the law of property." Roscoe Pound, "The Administrative Application of Legal Standards," 44 *American Bar Association Reports* 445 (1919); cited from reprint in *Selected Essays on Constitutional Law* (Chicago, 1938), Vol. iv, p. 83. (I have used the quotation out of its context.) To retrace one's steps from this thinking to the raw material which formed it, one must go all the way back to the living conditions of the people, there to observe the economic and political pressures which those conditions generated. It is necessary also to note how wants are translated into aspirations; how aspirations become principles; and how principles may be incorporated into law. This story has been spread out by a group of recent historians: Charles A. Beard, in *An Economic Interpretation of the Constitution of the United States*, and its companion, *The Economic Origins of Jeffersonian Democracy* (New York, 1935); A. M. Schlesinger, *New Viewpoints in American History* (New York, 1926); V. L. Parrington, *Main Currents in American Thought* (New York, 1927); R. H. Gabriel, *The Course of American Democratic Thought* (New York, 1940); and Merle Curti, *The Growth of American Thought* (New York, 1943).

The pertinent provisions of the Criminal Syndicalism Act are:

"Section 1. The term 'criminal syndicalism' as used in this act is hereby defined as any doctrine or precept advocating . . . the commission of crime, sabotage. . . , or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change.

"Sec. 2. Any person who . . . 4. Organizes . . . or knowingly becomes a member of, any organization . . . assembled to advocate . . . criminal syndicalism; . . .

"Is guilty of a felony and punishable by imprisonment." . . .

The following facts, among many others, were established on the trial by undisputed evidence: The defendant, a resident of Oakland, in Alameda County, California, had been a member of the Local Oakland branch of the Socialist Party. This Local sent delegates to the national convention of the Socialist Party held in Chicago in 1919, which resulted in a split between the "radical" group and the old-wing Socialists. The "radicals"—to whom the Oakland delegates adhered—being ejected, went to another hall, and formed the Communist Labor Party of America. . . . In its "Platform and Program" the Party declared that it was in full harmony with "the revolutionary working class parties of all countries" and adhered to the principles of Communism laid down in the Manifesto of the Third International at Moscow, and that its purpose was "to create a unified revolutionary working class movement in America," organizing the workers as a class, in a revolutionary class struggle to conquer the capitalist state, for the overthrow of capitalist rule, the conquest of political power and the establishment of a working class government, the Dictatorship of the Proletariat. . . .

Shortly thereafter the Local Oakland withdrew from the Socialist Party, and sent accredited delegates, including the defendant, to a convention held in Oakland in November, 1919, for the purpose of organizing a California branch of the Communist Labor Party. The defendant . . . attended this convention as a delegate and took an active part in its proceedings. She was elected a member of the Credentials Committee. . . . She was also appointed a member of the Resolutions Committee. . . .

. . . . She later attended as an alternate member one or two meetings of the State Executive Committee in San Jose and San Francisco, and stated, on the trial, that she was then a member of the Communist Labor Party. She also testified that it was not her intention that the Communist Labor Party of California should be an instrument of terrorism or violence, and that it was not her purpose or that of the Convention to violate any known law.

In the light of this preliminary statement, we now take up, in so far

as they require specific consideration, the various grounds upon which it is here contended that the Syndicalism Act and its application in this case is repugnant to the due process and equal protection clauses of the Fourteenth Amendment.

1. The argument is, in effect, that the character of the state organization could not be forecast when she attended the convention; and that her mere presence in the convention, however violent the opinions expressed therein, could not thereby become a crime. This contention, while advanced in the form of a constitutional objection to the Act, is in effect nothing more than an effort to review the weight of the evidence for the purpose of showing that the defendant did not join and assist in organizing the Communist Labor Party of California with a knowledge of its unlawful character and purpose. This question, which is foreclosed by the verdict of the jury—sustained by the Court of Appeals —is one of fact merely which is not open to review in this Court, involving as it does no constitutional question whatever. . . .

2. It is clear that the Syndicalism Act is not repugnant to the due process clause by reason of vagueness and uncertainty of definition. . . .

So, as applied here, the Syndicalism Act required of the defendant no "prophetic" understanding of its meaning.

And similar Criminal Syndicalism statutes in other States, some less specific in their definitions, have been held by the State courts not to be void for indefiniteness. . . .

3.

4. Nor is the Syndicalism Act as applied in this case repugnant to the due process clause as a restraint of the rights of free speech, assembly, and association.

That the freedom of speech which is secured by the Constitution does not confer an absolute right to speak, without responsibility, whatever one may choose, or an unrestricted and unbridled license giving immunity for every possible use of language and preventing the punishment of those who abuse this freedom; and that a State in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to incite to crime, disturb the public peace, or endanger the foundation of organized government and threaten its overthrow by unlawful means, is not open to question. *Gitlow v. New York*, 268 U.S. 652, 666, 668, and cases cited. . . .

The essence of the offense denounced by the Act is the combining with others in an association for the accomplishment of the desired ends through the advocacy and use of criminal and unlawful methods. It partakes of the nature of a criminal conspiracy. See *People v. Steelik*, (187 Cal. 361, 372) 203 P. 78. That such united and joint action involves even greater danger to the public peace and security than the isolated utter-

ances and acts of individuals is clear. We cannot hold that, as here applied, the Act is an unreasonable or arbitrary exercise of the police power of the State, unwarrantably infringing any right of free speech, assembly or association, or that those persons are protected from punishment by the due process clause who abuse such rights by joining and furthering an organization thus menacing the peace and welfare of the State. . . .

MR. JUSTICE BRANDEIS, concurring. . . .

The felony which the statute created is a crime very unlike the old felony of conspiracy or the old misdemeanor of unlawful assembly. The mere act of assisting in the forming of a society for teaching syndicalism, of becoming a member of it, or assembling with others for that purpose is given the dynamic quality of crime. There is guilt although the society may not contemplate immediate promulgation of the doctrine. Thus the accused is to be punished, not for attempt, incitement or conspiracy, but for a step in preparation, which, if it threatens the public order at all, does so only remotely. The novelty in the prohibition introduced is that the statute aims, not at the practice of criminal syndicalism, nor even directly at the preaching of it, but at association with those who propose to preach it.

Despite arguments to the contrary which had seemed to me persuasive, it is settled that the due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure. Thus all fundamental rights comprised within the term liberty are protected by the federal Constitution from invasion by the states. . . .

It is said to be the function of the Legislature to determine whether at a particular time and under the particular circumstances the formation of, or assembly with, a society organized to advocate criminal syndicalism constitutes a clear and present danger of substantive evil; and that by enacting the law here in question the Legislature of California determined that question in the affirmative. . . . The Legislature must obviously decide, in the first instance, whether a danger exists which calls for a particular protective measure. But where a statute is valid only in case certain conditions exist, the enactment of the statute cannot alone establish the facts which are essential to its validity. Prohibitory legislation has repeatedly been held invalid, because unnecessary, where the denial of liberty involved was that of engaging in a particular business. The powers of the courts to strike down an offending law are no less when the interests involved are not property rights, but the fundamental personal rights of free speech and assembly.

This court has not yet fixed the standard by which to determine when a danger shall be deemed clear; how remote the danger may be and yet be deemed present; and what degree of evil shall be deemed sufficiently

substantial to justify resort to abridgement of free speech and assembly as the means of protection. To reach sound conclusions on these matters, we must bear in mind why a state is, ordinarily, denied the power to prohibit dissemination of social, economic and political doctrine which a vast majority of its citizens believes to be false and fraught with evil consequence.

Those who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears. To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the evil to be prevented is a serious one. Every denunciation of existing law tends in some measure to increase the probability that there will be violation of it. Condonation of a breach enhances the probability. Expressions of approval add to the probability. Propagation of the criminal state of mind by teaching syndicalism increases it. Advocacy of law-breaking heightens it still further. But even advocacy of violation, however reprehensible, morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately

acted on. The wide difference between advocacy and incitement, between preparation and attempt, between assembling and conspiracy, must be borne in mind. In order to support a finding of clear and present danger it must be shown either that immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated.

Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom. Such, in my opinion, is the command of the Constitution. It is therefore always open to Americans to challenge a law abridging free speech and assembly by showing there was no emergency justifying it.

Moreover, even imminent danger cannot justify resort to prohibition of these functions essential to effective democracy, unless the evil apprehended is relatively serious. Prohibition of free speech and assembly is a measure so stringent that it would be inappropriate as the means for averting a relatively trivial harm to society. A police measure may be unconstitutional merely because the remedy, although effective as means of protection, is unduly harsh or oppressive. Thus, a state might, in the exercise of its police power, make any trespass upon the land of another a crime, regardless of the results or of the intent or purpose of the trespasser. It might, also, punish an attempt, a conspiracy, or an incitement to commit the trespass. But it is hardly conceivable that this court would hold constitutional a statute which punished as a felony the mere voluntary assembly with a society formed to teach that pedestrians had the moral right to cross uninclosed, unposted, waste lands and to advocate their doing so, even if there was imminent danger that advocacy would lead to a trespass. The fact that speech is likely to result in some violence or in destruction of property is not enough to justify its suppression. There must be the probability of serious injury to the State. Among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgment of the rights of free speech and assembly.

The California Syndicalism Act recites in section 4:

"Inasmuch as this act concerns and is necessary to the immediate

preservation of the public peace and safety, for the reason that at the present time large numbers of persons are going from place to place in this state advocating, teaching, and practicing criminal syndicalism, this act shall take effect upon approval by the Governor."

The legislative declaration satisfies the requirement of the Constitution of the state concerning emergency legislation. . . . But it does not preclude inquiry into the question whether, at the time and under the circumstances, the conditions existed which are essential to validity under the federal Constitution. As a statute, even if not void on its face, may be challenged because invalid as applied, . . . the result of such an inquiry may depend upon the specific facts of the particular case. Whenever the fundamental rights of free speech and assembly are alleged to have been invaded, it must remain open to a defendant to present the issue whether there actually did exist at the time a clear danger, whether the danger, if any, was imminent, and whether the evil apprehended was one so substantial as to justify the stringent restriction interposed by the Legislature. The legislative declaration, like the fact that the statute was passed and was sustained by the highest court of the State, creates merely a rebuttable presumption that these conditions have been satisfied.

Whether in 1919, when Miss Whitney did the things complained of, there was in California such clear and present danger of serious evil, might have been made the important issue in this case. She might have required that the issue be determined either by the court or by the jury. She claimed below that the statute as applied to her violated the federal Constitution; but she did not claim that it was void because there was no clear and present danger of serious evil, nor did she request that the existence of these conditions of a valid measure thus restricting the rights of free speech and assembly be passed upon by the court or a jury. On the other hand, there was evidence on which the court or jury might have found that such danger existed. I am unable to assent to the suggestion in the opinion of the court that assembling with a political party, formed to advocate the desirability of a proletarian revolution by mass action at some date necessarily far in the future, is not right within the protection of the Fourteenth Amendment. In the present case, however, there was other testimony which tended to establish the existence of a conspiracy, on the part of members of the International Workers of the World, to commit present serious crimes, and likewise to show that such a conspiracy would be furthered by the activity of the society of which Miss Whitney was a member. Under these circumstances the judgment of the State court cannot be disturbed. . . .

MR. JUSTICE HOLMES joins in this opinion.

HAGUE *v.* COMMITTEE FOR INDUSTRIAL ORGANIZATION, *et al.*

Supreme Court of the United States. 1939.
307 U.S. 496.

MR. JUSTICE BUTLER:

The judgment of the court in this case is that the decree is modified and as modified affirmed. MR. JUSTICE FRANKFURTER and MR. JUSTICE DOUGLAS took no part in the consideration or decision of the case. MR. JUSTICE ROBERTS has an opinion, and MR. JUSTICE STONE an opinion. The CHIEF JUSTICE concurs in an opinion. MR. JUSTICE McREYNOLDS and MR. JUSTICE BUTLER dissent for reasons stated in opinions by them respectively.

MR. JUSTICE ROBERTS delivered an opinion in which MR. JUSTICE BLACK concurred.

We granted certiorari as the case presents important questions in respect of the asserted privilege and immunity of citizens of the United States to advocate action pursuant to a federal statute, by distribution of printed matter and oral discussion in peaceable assembly; and the jurisdiction of federal courts of suits to restrain the abridgment of such privilege and immunity.

The respondents, individual citizens, unincorporated labor organizations composed of such citizens, and a membership corporation, brought suit in the United States District Court against the petitioners, the Mayor, the Director of Public Safety, and the Chief of Police of Jersey City, New Jersey, and the Board of Commissioners, the governing body of the city. . . .

After trial upon the merits the District Court entered findings of fact and conclusions of law and a decree in favor of respondents. In brief, the court found that the purposes of respondents, other than the American Civil Liberties Union, were the organization of unorganized workers into labor unions, causing such unions to exercise the normal and legal functions of labor organizations ; that the petitioners, acting in their official capacities, have adopted and enforced the deliberate policy of excluding and removing from Jersey City the agents of the respondents; have interfered with their right of passage upon the streets and access to the parks of the city; that these ends have been accomplished by force and violence despite the fact that the persons affected were acting in an orderly and peaceful manner. . . .

The court further found that the petitioners, as officials, acting in reliance on the ordinance dealing with the subject, have adopted and

enforced a deliberate policy of preventing the respondents, and their associates, from distributing circulars, leaflets, or handbills in Jersey City; that this has been done by policemen acting forcibly ; that the circulars and handbills were not offensive to public morals, and did not advocate unlawful conduct, but were germane to the purposes alleged in the bill.

The findings are that the petitioners, as officials, have adopted and enforced a deliberate policy of forbidding the respondents and their associates from communicating their views respecting the National Labor Relations Act to the citizens of Jersey City by holding meetings or assemblies in the open air and at public places. . . .

The court found that the petitioners' enforcement of their policy against the respondents caused the latter irreparable damage; and that they have done nothing to disentitle them to equitable relief.

The court concluded that it had jurisdiction under Sec. 24(1), (12) and (14) of the Judicial Code; that the petitioners' official policy and acts were in violation of the Fourteenth Amendment. . . .

The Circuit Court of Appeals concurred in the findings of fact; modified the decree in respect of one of its provisions, and, as modified, affirmed it.

By their specifications of error, the petitioners limit the issues in this court to three matters. They contend that the court below erred in holding that the District Court had jurisdiction over all or some of the causes of action stated in the bill. Secondly, they assert that the court erred in holding that the street meeting ordinance is unconstitutional on its face, and that it has been unconstitutionally administered. Thirdly, they claim that the decree must be set aside because it exceeds the court's power and is impracticable of enforcement or of compliance.

First. Every question arising under the Constitution may, if properly raised in a state court, come ultimately to this court for decision. . . .

Section 24 of the Judicial Code confers original jurisdiction upon District Courts of the United States. Subsection (1) gives jurisdiction of "suits of a civil nature, at common law or in equity, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of \$3000" and "arises under the Constitution or laws of the United States."

The wrongs of which respondents complain are tortious invasions of alleged civil rights by persons acting under color of state authority. . . . The record here is bare of any showing of the value of the asserted rights to the respondents individually, and the suggestion that, in total, they have the requisite value is unavailing, since the plaintiffs may not aggregate their interests in order to attain the amount necessary to give juris-

diction. We conclude that the District Court lacked jurisdiction under Section 24(1).

Section 24(14) grants jurisdiction of suits "at law or in equity . . . to redress the deprivation, under color of any law . . . of any State, of any right, privilege or immunity, secured by the Constitution of the United States, or . . . by any law of the United States providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States."

. . . . The courts below have held that citizens of the United States possess such rights by virtue of their citizenship; that the Fourteenth Amendment secures these rights against invasion by a state, and authorizes legislation by Congress to enforce the Amendment.

Prior to the Civil War there was confusion and debate as to the relation between United States citizenship and state citizenship. Beyond dispute, citizenship of the United States, as such, existed. The Constitution, in various clauses, recognized it but nowhere defined it. Many thought state citizenship, and that only, created United States citizenship.

After the adoption of the Thirteenth Amendment a bill, which became the first Civil Rights Act, was introduced in the 39th Congress, the major purpose of which was to secure to the recently freed negroes all the civil rights secured to white men. . . .

By reason of doubts as to the power to enact the legislation, and because the policy thereby evidenced might be reversed by a subsequent Congress, there was introduced at the same session an additional amendment to the Constitution which became the Fourteenth.

The first sentence of the Amendment settled the old controversy as to citizenship. . . . Thenceforward citizenship of the United States became primary and citizenship of a state secondary.

The first section of the Amendment further provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;"

The second Civil Rights Act was passed by the 41st Congress. Its purpose was to enforce the provisions of the Fourteenth Amendment. . . . By Section 18 it reenacted the Civil Rights Act of 1866.

A third Civil Rights Act, adopted April 20, 1871, provided "That any person who, under color of any law . . . of any state, shall subject . . . any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall . . . be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress; . . ." This . . . became R. S. 1979, now Title 8, # 43 of the United States Code.

As has been said, prior to the adoption of the Fourteenth Amend-

ment, there had been no constitutional definition of citizenship of the United States. . . . The phrase "privileges and immunities" was used in Article IV, Section 2 of the Constitution. . . .

At one time it was thought that this section recognized a group of rights which, according to the jurisprudence of the day, were classed as "natural rights"; and that the purpose of the section was to create rights of citizens of the United States by guaranteeing the citizens of every state the recognition of this group of rights by every other state. . . .

While this description of the civil rights of the citizens of the states has been quoted with approval, it has come to be settled that Article IV, Section 2, does not import that a citizen of one state carries with him into another fundamental privileges and immunities which come to him necessarily by the mere fact of his citizenship in the state first mentioned, but, on the contrary, that in any state every citizen of any other state is to have the same privileges and immunities which the citizens of that state enjoy. The section, in effect, prevents a state from discriminating against citizens of other states in favor of its own.

The question now presented is whether freedom to disseminate information concerning the provisions of the National Labor Relations Act, to assemble peaceably for discussion of the Act . . . is a privilege or immunity of a citizen of the United States secured against state abridgment by Section 1 of the Fourteenth Amendment; and whether R. S. 1979 and Section 24(14) of the Judicial Code afford redress in a federal court for such abridgment. This is the narrow question presented by the record, and we confine our decision to it, without consideration of broader issues which the parties urge. . . .

Although it has been held that the Fourteenth Amendment created no rights in citizens of the United States, but merely secured existing rights against state abridgment, it is clear that the right peaceably to assemble and to discuss these topics . . . is a privilege inherent in citizenship of the United States which the Amendment protects. . . .

No expression of a contrary view has ever been voiced by this court. . . .

Citizenship of the United States would be little better than a name if it did not carry with it the right to discuss national legislation. . . . All of the respondents' proscribed activities had this single end and aim. The District Court had jurisdiction under Section 24(14).

Natural persons, and they alone, are entitled to the privileges and immunities which Section 1 of the Fourteenth Amendment secures for "citizens of the United States." Only the individual respondents may, therefore, maintain this suit.

Second. What has been said demonstrates that . . . privileges and

immunities of the individual respondents as citizens of the United States, were infringed by the petitioners, by virtue of their official positions. . . .

We think the court below was right in holding the ordinance void upon its face. It does not make comfort or convenience in the use of streets or parks the standard of official action. . . . It can thus, as the record discloses, be made the instrument of arbitrary suppression of free expression of views on national affairs for the prohibition of all speaking will undoubtedly "prevent" such eventualities (as riots, disturbances or disorderly assemblage). . . .

Third. It remains to consider the objections to the decree. . . . We agree with the court below that the objection (that the decree is so vague as to be unenforceable) is not well founded.

. . . . The decree attempts to formulate the conditions under which respondents and their sympathizers may distribute such literature free of interference. . . . We think the decree goes too far. All respondents are entitled to is a decree declaring the ordinance void and enjoining the petitioners from enforcing it.

. . . . Although the court below held the ordinance void, the decree enjoins the petitioners as to the manner in which they shall administer it. . . . We think this is wrong. . . . The courts cannot rewrite the ordinance, as the decree, in effect, does. . . .

MR. JUSTICE STONE.

I do not doubt that the decree below, modified as has been proposed, is rightly affirmed, but I am unable to follow the path by which some of my brethren have attained that end, and I think the matter is of sufficient importance to merit discussion in some detail.

It has been explicitly and repeatedly affirmed by this Court, without a dissenting voice, that freedom of speech and of assembly for any lawful purpose are rights of personal liberty secured to all persons, without regard to citizenship, by the due process clause of the Fourteenth Amendment. *Gibson v. New York*, 268 U.S. 652; *Whitney v. California*, 274 U.S. 357; . . . *Lovell v. Griffin*, 303 U.S. 444. It has never been held that either is a privilege or immunity peculiar to citizenship of the United States, to which alone the privileges and immunities clause refers, *Slaughter-House Cases*, 16 Wall. 36; . . . *Twining v. New Jersey*, 211 U.S. 78, 97 . . . , and neither can be brought within the protection of that clause without enlarging the category of privileges and immunities of United States citizenship as it has hitherto been defined.

. . . . Hence there is no occasion, for jurisdictional purposes or any other, to consider whether freedom of speech and of assembly are

immunities secured by the privileges and immunities clause of the Fourteenth Amendment to citizens of the United States, or to revive the contention, rejected by this Court in the *Slaughter-House Cases*, *supra*, that the privileges and immunities of United States citizenship, protected by that clause, extend beyond those which arise or grow out of the relationship of United States citizens to the national government.

That such is the limited application of the privileges and immunities clause seems now to be conceded by my brethren. . . .

The respondents in their bill of complaint specifically named and quoted Article IV, # 2, now conceded to be inapplicable, and the due process and equal protection clauses of the Fourteenth Amendment as the provisions of the Constitution which secure to them the rights of free speech and assembly. They omitted the privileges and immunities clause of the Fourteenth Amendment from their quotation. They made no specific allegation that any of those whose freedom had been interfered with by petitioners was a citizen of the United States. . . . There is no finding by either court below that any of the respondents or any of those whose freedom of speech and assembly has been infringed are citizens of the United States, and we are referred to no part of the evidence in which their citizenship is mentioned or from which it can be inferred.

Both courts below found, and the evidence supports the findings, that the purpose of respondents, other than the Civil Liberties Union, in holding meetings in Jersey City, was to organize labor unions in various industries in order to secure to workers the benefits of collective bargaining with respect to betterment of wages, hours of work and other terms and conditions of employment. Whether the proposed unions were to be organized in industries which might be subject to the National Labor Relations Act or to the jurisdiction of the National Labor Relations Board does not appear. Neither court below has made any finding that the meetings were called to discuss, or that they ever did in fact discuss, the National Labor Relations Act. The findings do not support the conclusion that the proposed meetings involved any such relationship between the national government and respondents or any of them, assuming they are citizens of the United States, as to show that the asserted right or privilege was that of a citizen of the United States, and I cannot say that an adequate basis has been laid for supporting a theory—which respondents themselves evidently did not entertain—that any of their privileges as citizens of the United States, guaranteed by the Fourteenth Amendment, were abridged, as distinguished from the privileges guaranteed to all persons by the due process clause. . . . If, as my brethren think, respondents are entitled to maintain in this suit only the rights secured to them by the privileges and immunities clause of the Fourteenth

Amendment—here the right to disseminate information about the National Labor Relations Act—it is plain that the decree is too broad. Instead of enjoining, as it does, interferences with all meetings for all purposes and the lawful dissemination of all information, it should have confined its restraint to interferences with the dissemination of information about the National Labor Relations Act, through meetings or otherwise. The court below rightly omitted any such limitation from the decree. . . .

. . . . I am unable to rest decision here on the assertion, which I think the record fails to support, that respondents must depend upon their limited privileges as citizens of the United States in order to sustain their cause, or upon so palpable an avoidance of the real issue in the case, which respondents have raised by their pleadings and sustained by their proof. That issue is whether the present proceeding can be maintained under # 24(14) of the Judicial Code as a suit for the protection of rights and privileges guaranteed by the due process clause. . . .

The right to maintain the present suit is conferred upon the individual respondents by the due process clause and Acts of Congress, regardless of their citizenship and of the amount in controversy. . . .

Following the decision in the *Slaughter-House Cases* and before the later expansion by judicial decision of the content of the due process and equal protection clauses, there was little scope for the operation of this statute (the Civil Rights Act of 1871, 17 Stat. 13) under the Fourteenth Amendment. . . .

Since freedom of speech and freedom of assembly are rights secured to persons by the due process clause, all of the individual respondents are plainly authorized by # 1 of the Civil Rights Act of 1871 to maintain the present suit in equity to restrain infringement of their rights. As to the American Civil Liberties Union, which is a corporation, it cannot be said to be deprived of the civil rights of freedom of speech and of assembly, for the liberty guaranteed by the due process clause is the liberty of natural, not artificial, persons. . . .

MR. JUSTICE REED concurs in this opinion.

MR. CHIEF JUSTICE HUGHES, concurring:

With respect to the merits I agree with the opinion of MR. JUSTICE ROBERTS and in the affirmance of the judgment as modified. With respect to the point as to jurisdiction I agree with what is said in the opinion of MR. JUSTICE ROBERTS as to the right to discuss the National Labor Relations Act being a privilege of a citizen of the United States, but I am not satisfied that the record adequately supports the resting of juris-

diction upon that ground. As to that matter, I concur in the opinion of MR. JUSTICE STONE.

MR. JUSTICE McREYNOLDS, dissenting. . . .

MR. JUSTICE BUTLER, dissenting. . . .

MR. JUSTICE FRANKFURTER and MR. JUSTICE DOUGLAS took no part in the consideration and decision of this case.

NOTE TO THE HAGUE CASE

This case has several curious aspects.

1. It is the first case in constitutional law since 1860 known to the editor in which there is no opinion of the Court. Mr. Justice Roberts took only Mr. Justice Black with him. Mr. Justice Stone has with him on the primary issue of jurisdiction the Chief Justice and Mr. Justice Reed. These Justices are the affirmative, such as it is.

2. The Chief Justice presents an ambiguous, or, at least, an obscure opinion. Query: What are the merits? If the Chief Justice rests jurisdiction where Mr. Justice Stone puts it, then a consideration of the merits would seem to involve a consideration of the alleged violation of due process, rather than an analysis of United States citizenship; that is, if a consideration of the merits is necessary to a decision.

3. Mr. Justice Stone's attack on the invocation of the privileges of federal citizenship in this case should be compared with his biting dissent in *Colgate v. Harvey*, 296 U.S. 404 (1935). At the time that case was decided no Roosevelt appointees had been made. Roosevelt appointees on the Court which decided the present case were Black, Reed, Frankfurter and Douglas. It is clear that there is within the Court an inclination to apply the rights of federal citizenship in preference to the due process or the commerce clauses to delimit state authority. The doctrine is of conservative origin, and the dissent in the Hague case does not signify a change of attitude on the part of the conservatives surviving from the personnel of the old Court. Roberts and Hughes were with the majority in *Colgate v. Harvey*. They have now increased their number by the addition of Black. There are, then, five justices who are willing in appropriate circumstances to augment or extend the rights of United States citizenship. But to arrive at an agreement in a given case, it will be necessary for the membership of the Court to divide and then to subdivide. The majority must be formed from a coalition of liberal and conservative opinion; and this coalition will cause, as in the principle case, a split within the liberal group. It is interesting but not determina-

tive to observe that Frankfurter and Douglas, silent here, succeeded two justices who joined with Mr. Justice Stone in his dissent in the *Colgate Case*, that is, Brandeis and Cardozo.

4. The form of the present decision is odd in that one of the justices was selected to act as an announcer of the opinions to be delivered. That he was in the dissent is probably irrelevant to his function.

Freedom of the Press

GITLOW v. NEW YORK.

Supreme Court of the United States. 1925.
268 U.S. 652.

MR. JUSTICE SANFORD delivered the opinion of the Court.

Benjamin Gitlow was indicted in the Supreme Court of New York, with three others, for the statutory crime of criminal anarchy. . . . He was separately tried, convicted, and sentenced to imprisonment. . . .

The contention here is that the statute, by its terms and as applied in this case, is repugnant to the due process clause of the Fourteenth Amendment. . . .

The indictment was in two counts. The first charged that the defendants had advocated, advised and taught the duty, necessity and propriety of overthrowing and overturning organized government by force, violence and unlawful means, by certain writings therein set forth entitled "The Left Wing Manifesto"; the second that the defendants had printed, published and knowingly circulated and distributed a certain paper called "The Revolutionary Age," containing the writings set forth in the first count. . . .

. . . . The sole contention here is, essentially, that as there was no evidence of any concrete result flowing from the publication of the Manifesto or of circumstances showing the likelihood of such result, the statute as construed and applied by the trial court penalizes the mere utterance, as such, of "doctrine" having no quality of incitement, without regard either to the circumstances of its utterance or to the likelihood of unlawful sequences. . . . The argument in support of this contention rests primarily upon the following propositions: 1st, That the "liberty" protected by the Fourteenth Amendment includes the liberty of speech and of the press; and 2d, That while liberty of expression "is not absolute," it may be restrained "only in circumstances where its exercise bears a causal relation with some substantive evil, consummated, attempted or likely," and as the statute "takes no account of circum-

stances," it unduly restrains the liberty and is therefore unconstitutional. . . .

The Manifesto, plainly, is neither the statement of abstract doctrine, nor, as suggested by counsel, mere prediction that industrial disturbances and revolutionary mass strikes will result spontaneously in an inevitable process of evolution in the economic system. It advocates and urges in fervent language mass action which shall progressively foment mass disturbances and through political mass strikes and revolutionary mass action overthrow and destroy organized parliamentary government. It concludes with a call to action in these words:

"The proletariat revolution and the Communist reconstruction of society—the *struggle for these*—is now indispensable. . . . The Communist International calls the proletariat of the world to the final struggle!"

This is not the expression of philosophical abstraction, the mere prediction of future events; it is the language of direct incitement.

The means advocated for bringing about the destruction of organized parliamentary government, namely, mass industrial revolts usurping the functions of municipal government, political mass strikes directed against the parliamentary state, and revolutionary mass action for its final destruction, necessarily imply the use of force and violence, and in their essential nature are inherently unlawful in a constitutional government of law and order. That the jury were warranted in finding that the Manifesto advocated not merely the abstract doctrine of overthrowing organized government by force, violence and unlawful means, but action to that end, is clear.

For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and "liberties" protected by the due process clause of the Fourteenth Amendment from impairment by the States. . . .

It is a fundamental principle, long established, that the freedom of speech and of the press which is secured by the Constitution does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom. . . .

That a State in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace, is not open to question. . . .

And, for yet more imperative reasons, a State may punish utterances endangering the foundations of organized government and threatening its

overthrow by unlawful means. These imperil its own existence as a constitutional State. . . .

By enacting the present statute the State has determined, through its legislative body, that utterances advocating the overthrow of organized government by force, violence and unlawful means, are so inimical to the general welfare and involve such danger of substantive evil that they may be penalized in the exercise of its police power. That determination must be given great weight. Every presumption is to be indulged in favor of the validity of the statute. . . . That utterances inciting to the overthrow of organized government by unlawful means present a sufficient danger of substantive evil to bring their punishment within the range of legislative discretion is clear. Such utterances, by their very nature, involve danger to the public peace and to the security of the State. They threaten breaches of the peace and ultimate revolution. And the immediate danger is none the less real and substantial, because the effect of a given utterance cannot be accurately foreseen. The State cannot reasonably be required to measure the danger from every such utterance in the nice balance of a jeweler's scale. A single revolutionary spark may kindle a fire that, smouldering for a time, may burst into a sweeping and destructive conflagration. It cannot be said that the State is acting arbitrarily or unreasonably when in the exercise of its judgment as to the measures necessary to protect the public peace and safety, it seeks to extinguish the spark without waiting until it has enkindled the flame or blazed into the conflagration. It cannot reasonably be required to defer the adoption of measures for its own peace and safety until the revolutionary utterances lead to actual disturbances of the public peace or imminent and immediate danger of its own destruction; but it may, in the exercise of its judgment, suppress the threatened danger in its incipency. . . .

We cannot hold that the present statute is an arbitrary or unreasonable exercise of the police power of the State unwarrantably infringing the freedom of speech or press; and we must and do sustain its constitutionality.

This being so it may be applied to every utterance—not too trivial to be beneath the notice of the law—which is of such a character and used with such intent and purpose as to bring it within the prohibition of the statute. . . . In other words, when the legislative body has determined generally, in the constitutional exercise of its discretion, that utterances of a certain kind involve such danger of substantive evil that they may be punished, the question whether any specific utterance coming within the prohibited class is likely, in and of itself, to bring about the substantive evil, is not open to consideration. It is sufficient that the

statute itself be constitutional and that the use of the language comes within its prohibition.

It is clear that the question in such cases is entirely different from that involved in those cases where the statute merely prohibits certain acts involving the danger of substantive evil, without any reference to language itself, and it is sought to apply its provisions to language used by the defendant for the purpose of bringing about the prohibited results. There, if it be contended that the statute cannot be applied to the language used by the defendant because of its protection by the freedom of speech or press, it must necessarily be found, as an original question, without any previous determination by the legislative body, whether the specific language used involved such likelihood of bringing about the substantive evil as to deprive it of the constitutional protection. In such cases it has been held that the general provisions of the statute may be constitutionally applied to the specific utterance of the defendant if its natural tendency and probable effect was to bring about the substantive evil which the legislative body might prevent. *Schenck v. United States*, 249 U.S. 47. . . . And the general statement in the *Schenck* case (p. 52) that the "question in every case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils" (applies) only in cases of this class, and has no application to those like the present, where the legislative body itself has previously determined the danger or substantive evil arising from utterances of a specified character. . . .

MR. JUSTICE HOLMES, dissenting:

Mr. Justice Brandeis and I are of opinion that this judgment should be reversed. The general principle of free speech, it seems to me, must be taken to be included in the Fourteenth Amendment, in view of the scope that has been given to the word "liberty" as there used, although it may be accepted with a somewhat larger latitude of interpretation than is allowed to Congress by the sweeping language that governs, or ought to govern, the laws of the United States. . . . It is true that in my opinion this criterion was departed from in *Abrams v. United States*, 250 U.S. 616, but the convictions that I expressed in that case are too deep for it to be possible for me as yet to believe that it and *Schaefer v. United States*, 251 U.S. 466, have settled the law. If what I think the correct test is applied, it is manifest that there was no present danger of an attempt to overthrow the government by force on the part of the admittedly small minority who shared the defendant's views. It is said that this Manifesto was more than a theory, that it was an incitement.

Every idea is an incitement. It offers itself for belief, and, if believed, it is acted on unless some other belief outweighs it, or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason. But whatever may be thought of the redundant discourse before us, it had no chance of starting a present conflagration. If, in the long run, the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.

If the publication of this document had been laid as an attempt to induce an uprising against government at once, and not at some indefinite time in the future, it would have presented a different question. The object would have been one with which the law might deal, subject to the doubt whether there was any danger that the publication could produce any result; or, in other words, whether it was not futile and too remote from possible consequences. But the indictment alleges the publication and nothing more.

NEAR v. MINNESOTA.

Supreme Court of the United States. 1931.
283 U.S. 697.

MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court.

Chapter 285 of the Session Laws of Minnesota for the year 1925 provides for the abatement as a public nuisance, of a "malicious, scandalous and defamatory newspaper, magazine or other periodical."

Under this statute the county attorney of Hennepin County brought this action to enjoin the publication of what was described as a "malicious, scandalous and defamatory newspaper, magazine or other periodical," known as *The Saturday Press*, published by the defendants in the city of Minneapolis. The judgment perpetually enjoined the defendants "from further conducting said nuisance under the name and title of said *The Saturday Press* or any other name or title."

The defendant *Near* appealed from this judgment to the Supreme Court of the State, and the judgment was affirmed. . . .

This statute, for the suppression as a public nuisance of a newspaper or periodical, is unusual, if not unique, and raises questions of grave importance transcending the local interests involved in the particular action. It is no longer open to doubt that the liberty of the press and of speech is within the liberty safeguarded by the due process clause of the Four-

teenth Amendment from invasion by state action. It was found impossible to conclude that this essential personal liberty of the citizen was left unprotected by the general guaranty of fundamental rights of person and property. . . . In maintaining this guaranty, the authority of the State to enact laws to promote the health, safety, morals, and general welfare of its people is necessarily admitted. The limits of this sovereign power must always be determined with appropriate regard to the particular subject of its exercise. . . .

If we cut through mere details of procedure, the operation and effect of the statute in substance is that public authorities may bring the owner or publisher of a newspaper or periodical before a judge upon a charge of conducting a business of publishing scandalous and defamatory matter—in particular that the matter consists of charges against public officers of official dereliction—and, unless the owner or publisher is able and disposed to bring competent evidence to satisfy the judge that the charges are true and are published with good motives and for justifiable ends, his newspaper or periodical is suppressed and further publication is made punishable as a contempt. This is of the essence of censorship.

The question is whether a statute authorizing such proceedings in restraint of publication is consistent with the conception of the liberty of the press as historically conceived and guaranteed. In determining the extent of the constitutional protection, it has been generally, if not universally, considered that it is the chief purpose of the guaranty to prevent previous restraints upon publication. . . .

In the present case, we have no occasion to inquire as to the permissible scope of subsequent punishment. For whatever wrong the appellant has committed or may commit, by his publications, the State appropriately affords both public and private redress by its libel laws. As has been noted, the statute in question does not deal with punishments; it provides for no punishment, except in case of contempt for violation of the court's order, but for suppression and injunction—that is, for restraint upon publication.

Nor can it be said that the constitutional freedom from previous restraint is lost because charges are made of derelictions which constitute crimes. With the multiplying provisions of penal codes, and of municipal charters and ordinances carrying penal sanctions, the conduct of public officers is very largely within the purview of criminal statutes. The freedom of the press from previous restraint has never been regarded as limited to such animalversions as lay outside the range of penal enactments. Historically, there is no such limitation; it is inconsistent with the reason which underlies the privilege, as the privilege so limited would be of slight value for the purposes for which it came to be established.

The statute in question cannot be justified by reason of the fact that

the publisher is permitted to show, before injunction issues, that the matter published is true and is published with good motives and for justifiable ends. If such a statute, authorizing suppression and injunction on such a basis, is constitutionally valid, it would be equally permissible for the Legislature to provide that at any time the publisher of any newspaper could be brought before a court, or even an administrative officer (as the constitutional protection may not be regarded as resting on mere procedural details), and required to produce proof of the truth of his publication, or of what he intended to publish and of his motives, or stand enjoined. If this can be done, the Legislature may provide machinery for determining in the complete exercise of its discretion what are justifiable ends and restrain publication accordingly. And it would be but a step to a complete system of censorship. The recognition of authority to impose previous restraint upon publication in order to protect the community against the circulation of charges of misconduct, and especially of official misconduct, necessarily would carry with it the admission of the authority of the censor against which the constitutional barrier was erected. . . .

Equally unavailing is the insistence that the statute is designed to prevent the circulation of scandal which tends to disturb the public peace and to provoke assaults and the commission of crime. Charges of reprehensible conduct, and in particular of official malfeasance, unquestionably create a public scandal, but the theory of the constitutional guaranty is that even a more serious public evil would be caused by authority to prevent publication. . . .

. . . . We should add that this decision rests upon the operation and effect of the statute, without regard to the question of the truth of the charges contained in the particular periodical. . . .

MR. JUSTICE BUTLER, dissenting. . . .

The long criminal career of the Twin City Reporter—if it is in fact as described by defendants—and the arming and shooting arising out of the publication of *The Saturday Press*, serve to illustrate the kind of conditions in respect of the business of publishing malicious, scandalous, and defamatory periodicals by which the state Legislature presumably was moved to enact the law in question. It must be deemed appropriate to deal with conditions existing in Minnesota.

It is of the greatest importance that the States shall be untrammelled and free to employ all just and appropriate measures to prevent abuses of the liberty of the press. . . .

It is well known, as found by the state Supreme Court, that existing libel laws are inadequate effectively to suppress evils resulting from the

kind of business and publications that are shown in this case. The doctrine that measures such as the one before us are invalid because they operate as previous restraints to infringe freedom of press exposes the peace and good order of every community and the business and private affairs of every individual to the constant and protracted false and malicious assaults of any insolvent publisher who may have purpose and sufficient capacity to contrive and put into effect a scheme or program for oppression, blackmail or extortion. . . .

MR. JUSTICE VAN DEVANTER, MR. JUSTICE McREYNOLDS, and MR. JUSTICE SUTHERLAND concur in this opinion.

Unreasonable Searches and Seizures

SILVERTHORNE LUMBER CO., INC. *v.* UNITED STATES.

Supreme Court of the United States. 1920.
251 U.S. 385.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a writ of error brought to reverse a judgment of the District Court [for the Western District of New York] fining the Silverthorne Lumber Company two hundred and fifty dollars for contempt of court and ordering Frederick W. Silverthorne to be imprisoned until he should purge himself of a similar contempt. The contempt in question was a refusal to obey subpoenas and an order of Court to produce books and documents of the company before the grand jury to be used in regard to alleged violation of the statutes of the United States by the said Silverthorne and his father. One ground of the refusal was that the order of the court infringed the rights of the parties under the Fourth Amendment of the Constitution of the United States.

The facts are simple. An indictment upon a single specific charge having been brought against the two Silverthornes mentioned, they both were arrested at their homes early in the morning of February 25, 1919, and were detained in custody a number of hours. While they were thus detained representatives of the Department of Justice and the United States marshall without a shadow of authority went to the office of their company and made a clean sweep of all the books, papers and documents found there. All the employees were taken or directed to go to the office of the District Attorney of the United States to which also the books, &c., were taken at once. An application was made as soon as might be to the District Court for a return of what thus had

been taken unlawfully. It was opposed by the District Attorney so far as he had found evidence against the plaintiffs in error, and it was stated that the evidence so obtained was before the grand jury. Color had been given by the District Attorney to the approach of those concerned in the act by an invalid subpoena for certain documents relating to the charge in the indictment then on file. Thus the case is not that of knowledge acquired through the wrongful act of a stranger, but it must be assumed that the Government planned or at all events ratified the whole performance. Photographs and copies of material papers were made and a new indictment was framed based upon the knowledge thus obtained. The District Court ordered a return of the originals but impounded the photographs and copies. Subpoenas to produce the originals then were served and on the refusal of the plaintiffs in error to produce them the Court made an order that the subpoenas should be complied with, although it had found that all the papers had been seized in violation of the parties' constitutional rights. The refusal to obey this order is the contempt alleged. The Government now, while in form repudiating and condemning the illegal seizure, seeks to maintain its rights to avail itself of the knowledge obtained by that means which otherwise it would not have had.

The proposition could not be presented more nakedly. It is that although of course its seizure was an outrage which the Government now regrets, it may study the papers before it returns them, copy them, and then may use the knowledge that it has gained to call upon the owners in a more regular form to produce them; that the protection of the Constitution covers the physical possession but not any advantages that the Government can gain over the object of its pursuit by doing the forbidden act. *Weeks v. United States*, 232 U.S. 383, to be sure, had established that laying the papers directly before the grand jury, was unwarranted, but it is taken to mean only that two steps are required instead of one. In our opinion such is not the law. It reduces the Fourth Amendment to a form of words. 232 U.S. 393. The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed. . . .

THE CHIEF JUSTICE and MR. JUSTICE PITNEY dissent.

BURDEAU *v.* MCDOWELL.

Supreme Court of the United States. 1921.
256 U.S. 465.

[McDowell had been discharged by the company employing him, for alleged fraud. The company's representatives then forced open his private desk and his private safes, took the private papers found there, and presented them to the federal Department of Justice. Burdeau, special assistant to the Attorney General, planned to offer these papers to a grand jury as evidence tending to show a fraudulent use of the United States mails by McDowell. McDowell sought a court order for their return to him. The court exonerated the Government from complicity in the theft, but placed the papers in the custody of the clerk of court and restrained the Department of Justice from presenting the papers or copies of them to the grand jury or to any court, and from using any evidence obtained from them. Burdeau appealed.]

MR. JUSTICE DAY delivered the opinion of the court. . . .

We do not question the authority of the court to control the disposition of the papers, and come directly to the contention that the constitutional rights of the petitioner were violated by their seizure, and that having subsequently come into possession of the prosecuting officers of the Government, he was entitled to their return. . . .

The Fourth Amendment gives protection against unlawful searches and seizures, and as shown in the previous cases, its protection applies to governmental action. Its origin and history clearly show that it was intended as a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other than governmental agencies; as against such authority it was the purpose of the Fourth Amendment to secure the citizen in the right of unmolested occupation of his dwelling, and the possession of his property, subject to the right of seizure by process duly issued.

In the present case the record clearly shows that no official of the Federal Government had anything to do with the wrongful seizure of the petitioner's property, or any knowledge thereof until several months after the property had been taken from him and was in the possession of the Cities Service Company. It is manifest that there was no invasion of the security afforded by the Fourth Amendment against unreasonable search and seizure, as whatever wrong was done was the act of individuals in taking the property of another. A portion of the property

so taken and held was turned over to the prosecuting officers of the Federal Government. We assume that petitioner has an unquestionable right of redress against those who illegally and wrongfully took his private property under the circumstances herein disclosed, but with such remedies we are not now concerned.

The Fifth Amendment, as its terms import, is intended to secure the citizen from compulsory testimony against himself. It protects from extorted confessions, or examinations in court proceedings by compulsory methods.

The exact question to be decided here is: May the Government retain incriminating papers, coming to it in the manner described, with a view to their use in a subsequent investigation by a grand jury where such papers will be part of the evidence against the accused, and may be used against him upon trial should an indictment be returned?

We know of no constitutional principle which requires the Government to surrender the papers under such circumstances. Had it learned that such incriminatory papers tending to show a violation of federal law, were in the hands of a person other than the accused, it having had no part in wrongfully obtaining them, we know of no reason why a subpoena might not issue for the production of the papers as evidence. Such production would require no unreasonable search or seizure, nor would it amount to compelling the accused to testify against himself. . . .

MR. JUSTICE BRANDEIS, with whom concurs MR. JUSTICE HOLMES, dissenting.

Plaintiff's private papers were stolen. The thief, to further his own ends, delivered them to the law officer of the United States. He, knowing them to have been stolen, retains them for use against the plaintiff. Should the court permit him to do so?

That the court would restore the papers to plaintiff if they were still in the thief's possession is not questioned. That it has power to control the disposition of these stolen papers, although they have passed into the possession of the law officer, is also not questioned. But it is said that no provision of the Constitution requires their surrender and that the papers could have been subpoenaed. This may be true. Still I cannot believe that action of a public official is necessarily lawful, because it does not violate constitutional prohibitions and because the same result might have been attained by other and proper means. At the foundation of our civil liberty lies the principle which denies to governmental officials an exceptional position before the law and which subjects them to the same rules of conduct that are commands to the citizen. And in

the development of our liberty insistence upon procedural regularity has been a large factor. Respect for law will not be advanced by resort, in its enforcement, to means which shock the common man's sense of decency and fair play.

Access to the Courts: A Fair Trial

POWELL *v.* ALABAMA.

Supreme Court of the United States. 1932.
287 U.S. 45.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

However guilty defendants, upon due inquiry, might prove to have been, they were, until convicted, presumed to be innocent. It was the duty of the court having their cases in charge to see that they were denied no necessary incident of a fair trial. . . . The sole inquiry which we are permitted to make is whether the federal Constitution was contravened . . . and as to that, we confine ourselves . . . to the inquiry whether the defendants were in substance denied the right of counsel, and if so, whether such denial infringes the due process clause of the Fourteenth Amendment. . . .

It is hardly necessary to say that the right of counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice. Not only was that not done here, but such designation of counsel as was attempted was either so indefinite or so close upon the trial as to amount to a denial of effective and substantial aid in that regard. . . .

It is not enough to assume that counsel thus precipitated into the case thought there was no defense, and exercised their best judgment in proceeding to trial without preparation. . . . No attempt was made to investigate. No opportunity to do so was given. Defendants were immediately hurried to trial. . . .

If recognition of the right of a defendant charged with a felony to have the aid of counsel depended upon the existence of a similar right at common law as it existed in England when our Constitution was adopted, there would be great difficulty in maintaining it as necessary to due process. . . .

We do not overlook the case of *Hurtado v. California*, 110 U.S. 516. . . .

The Sixth Amendment, in terms, provides that in all criminal prosecutions the accused shall enjoy the right "to have the Assistance of

Counsel for his defence." In the face of the reasoning of the *Hurtado Case*, if it stood alone, it would be difficult to justify the conclusion that the right to counsel, being thus specifically granted by the Sixth Amendment, was also within the intendment of the due process of law clause. But the *Hurtado Case* does not stand alone.¹³ In the later case of *Chicago, Burlington & Q. R. Co. v. Chicago*, 166 U.S. 226, 241 this court held that a judgment of a state court, even though authorized by statute, by which private property was taken for public use without just compensation, was in violation of the due process of law required by the Fourteenth Amendment, notwithstanding that the Fifth Amendment explicitly declares that private property shall not be taken for public use without just compensation. . . .

Likewise, this court has considered that freedom of speech and of the press are rights protected by the due process clause of the Fourteenth Amendment, although in the First Amendment, Congress is prohibited in specific terms from abridging the right. *Gitlow v. New York*, 268 U.S. 652. . . .

These later cases establish that notwithstanding the sweeping character of the language in the *Hurtado Case*, the rule laid down is not without exceptions. The rule is an aid to construction, and in some instances may be conclusive; but it must yield to more compelling considerations whenever such considerations exist. The fact that the right involved is of such a character that it cannot be denied without violating those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions" (*Hebert v. Louisiana*, 272 U.S. 312, 316,), is obviously one of those compelling considerations which must prevail in determining whether it is embraced within the due process of law clause of the Fourteenth Amendment, although it be specifically dealt with in another part of the Federal Constitution. Evidently this court, in the later cases enumerated, regarded the rights there under consideration as of this fundamental character. That some such distinction must be observed is foreshadowed in *Twining v. New Jersey*, 211 U.S. 78, 99 where Mr. Justice Moody, speaking for the court, said that: ". . . . It is possible that some of the personal rights safeguarded by the first eight Amendments against national action may also be safeguarded against state action, because a denial of them would be a denial of due process of law. . . . If this is so, it is not because those rights are enumerated in the first eight Amendments, but because they are of such a nature that they are

¹³ The rule referred to is that no clause in the Constitution is redundant. By the reasoning in the *Hurtado* case the application of the rule as a test of what is due process results in the conclusion that the due process clause does not include a right specifically granted elsewhere in the Constitution.—Ed.

included in the conception of due process of law." While the question has never been categorically determined by this court, a consideration of the nature of the right and a review of the expressions of this and other courts makes it clear that the right to the aid of counsel is of this fundamental character. . . .

Where a court is controlled by passion or by prejudice, even though the State has provided adequate procedure to protect the rights of accused persons, due process has failed. But the Supreme Court, as a court of last resort, will decide for itself whether justice has been done substantially. Or, put differently, the court will decide for itself whether or not the existence of due procedure shall be accepted as showing that it has provided an adequate corrective to the power of passion or prejudice. *Frank v. Magnum*, 237 U.S. 309; *Moore v. Dempsey*, 261 U.S. 86.

By an Impartial Jury

STRAUDER *v.* WEST VIRGINIA.

Supreme Court of the United States. 1879.
100 U.S. 303.

[The State of West Virginia excluded members of the negro race from jury service. Strauder, a negro, was tried for murder by a jury of white men, was found guilty, and sentenced. The state Supreme Court upheld the conviction. The case came before the federal Supreme Court on error.]

MR. JUSTICE STRONG delivered the opinion of the court. . . .

In this court, several errors have been assigned, and the controlling questions underlying them all are, first, whether, by the Constitution and laws of the United States, every citizen of the United States has a right to a trial of an indictment against him by a jury selected and impaneled without discrimination against his race or color, because of race or color; and, second, if he has such a right, and is denied its enjoyment by the State in which he is indicted, may he cause the case to be removed into the Circuit Court of the United States?

It is to be observed that the first of these questions is not whether a colored man, when an indictment has been preferred against him, has a right to a grand or petit jury composed in whole or in part of persons of his own race or color, but it is whether, in the composition or selection of jurors by whom he is to be indicted or tried, all persons of his

race or color may be excluded by law, solely because of their race or color, so that by no possibility can any colored man sit upon the jury. . . .

This [Fourteenth Amendment] is one of a series of constitutional provisions having a common purpose: namely, securing to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the superior race enjoy. The true spirit and meaning of the amendments, as we said in the *Slaughter-House Cases* (16 Wall. 36), cannot be understood without keeping in view the history of the times when they were adopted, and the general objects they plainly sought to accomplish. At the time when they were incorporated into the Constitution, it required little knowledge of human nature to anticipate that those who had long been regarded as an inferior and subject race would, when suddenly raised to the rank of citizenship, be looked upon with jealousy and positive dislike, and that State laws might be enacted or enforced to perpetuate the distinctions that had before existed. Discriminations against them had been habitual. . . . The colored race, as a race, was abject and ignorant, and in that condition was unfitted to command the respect of those who had superior intelligence. . . . It was in view of these considerations the Fourteenth Amendment was framed and adopted. . . .

If this is the spirit and meaning of the amendment, whether it means more or not, it is to be construed liberally, to carry out the purposes of its framers. . . . The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race,—the right to exemption from unfriendly legislation against them distinctively as colored,—exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race.

That the West Virginia statute respecting juries—the statute that controlled the selection of the grand and petit jury in the case of the plaintiff in error—is such a discrimination ought not to be doubted. Nor would it be if the persons excluded by it were white men. . . . Nor if a law should be passed excluding all naturalized Celtic Irishmen, would there be any doubt of its inconsistency with the spirit of the amendment. The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed by the law. . . .

. . . . The very idea of a jury is a body of men composed of the

peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds. . . . It is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy. Prejudice in a local community is held to be a reason for a change of venue. . . .

In view of these considerations, it is hard to see why the statute of West Virginia should not be regarded as discriminating against a colored man when he is put upon trial for an alleged criminal offense against the State. It is not easy to comprehend how it can be said that while every white man is entitled to a trial by a jury selected from persons of his own race or color, or, rather, selected without discrimination against his color, and a negro is not, the latter is equally protected by the law with the former. . . .

We do not say that within the limits from which it is not excluded by the amendment, a State may not prescribe the qualifications of its jurors, and in doing so make discriminations. . . . We do not believe the Fourteenth Amendment was ever intended to prohibit this. Looking at its history, it is clear it had no such purpose. Its aim was against discrimination because of race or color. . . . We are not now called upon to affirm or deny that it had other purposes.

The Fourteenth Amendment makes no attempt to enumerate the rights it was designed to protect. It speaks in general terms, and those are as comprehensive as possible. Its language is prohibitory; but every prohibition implies the existence of rights and immunities, prominent among which is an immunity from inequality of legal protection, either for life, liberty, or property. . . .

MR. JUSTICE FIELD and MR. JUSTICE CLIFFORD dissented.

Self-incrimination

TWINING v. NEW JERSEY.

Supreme Court of the United States. 1908.

211 U.S. 78.

[Twining, a director of a bank in the State of New Jersey, was indicted with one other director of the bank for exhibiting to a state bank examiner a false paper with intent to deceive him. At the trial, the directors, defendants below, did not take the stand, nor did they call

witnesses in their behalf. In his charge to the jury, the trial judge said regarding this conduct: "Because a man does not go upon the stand you are not necessarily justified in drawing an inference of guilt. But you have a right to consider the fact that he does not go upon the stand where a direct accusation is made against him." New Jersey law permitted an inference of guilt to be drawn from the failure of an accused person to testify in denial of evidence incriminating him. Defendants were convicted and sentenced to imprisonment.]

MR. JUSTICE MOODY delivered the opinion of the court.

. . . . The general question therefore, is, whether such a law violates the Fourteenth Amendment, either by abridging the privileges or immunities of citizens of the United States, or by depriving persons of their life, liberty or property without due process of law. In order to bring themselves within the protection of the Constitution it is incumbent on the defendants to prove two propositions: first, that the exemption from compulsory self-incrimination is guaranteed by the Federal Constitution against impairment by the States; and, second, if it be so guaranteed, that the exemption was in fact impaired in the case at bar. The first proposition naturally presents itself for earlier consideration. If the right here asserted is not a Federal right, that is the end of the case. We have no authority to go further and determine whether the state court has erred in the interpretation of its own laws. . . .

The defendants contend, in the first place, that the exemption from self-incrimination is one of the privileges and immunities of citizens of the United States which the Fourteenth Amendment forbids the States to abridge that this was the intention of the framers of the Fourteenth Amendment, and that this part of it would otherwise have little or no meaning and effect. These arguments are not new to this court and the answer to them is found in its decisions. . . .

There can be no doubt, so far as the decision in the *Slaughter-House Cases* [16 Wall. 36] has determined the question, that the civil rights sometimes described as fundamental and inalienable, which before the war Amendments were enjoyed by state citizenship and protected by state government, were left untouched by this clause of the Fourteenth Amendment. Criticism of this case has never entirely ceased, nor has it ever received universal assent by members of this court. Undoubtedly, it gave much less effect to the Fourteenth Amendment than some of the public men active in framing it intended, and disappointed many others. On the other hand, if the views of the minority had prevailed it is easy to see how far the authority and independence of the States would

have been diminished, by subjecting all their legislative and judicial acts to correction by the legislative and review by the judicial branch of the National Government. . . . This part at least of the *Slaughter-House Cases* has been steadily adhered to by this court, so that it was said of it, in a case where the same clause of the amendment was under consideration (*Maxwell v. Dow*, 176 U.S. 581, 591), "The opinion upon the matters actually involved and maintained by the judgment in the case has never been doubted or overruled by any judgment of this court." The distinction between National and state citizenship and their respective privileges there drawn has come to be firmly established. . . . If, then, it be assumed, without deciding the point, that an exemption from compulsory self-incrimination is what is described as a fundamental right belonging to all who live under a free government, and incapable of impairment by legislation or judicial decision, it is, so far as the States are concerned, a fundamental right inherent in state citizenship, and is a privilege or immunity of that citizenship only. . . . *Slaughter-House Cases*, 16 Wall. 70.

The defendants, however, do not stop here. They appeal to another clause of the Fourteenth Amendment, and insist that the self-incrimination, which they allege the instruction to the jury compelled, was a denial of due process of law. . . . Few phrases of the law are so elusive of exact apprehension as this. . . . This court has always declined to give a comprehensive definition of it, and has preferred that its full meaning should be gradually ascertained by the process of inclusion and exclusion in the course of the decision of cases as they arise. There are certain general principles well settled, however, which narrow the field of discussion and may serve as helps to correct conclusions. . . .

First. What is due process of law may be ascertained by an examination of those settled usages and modes of proceedings existing in the common and statute law of England before the emigration of our ancestors, and shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country. . . .

Second. It does not follow, however, that a procedure settled in English law at the time of the emigration, and brought to this country and practiced by our ancestors, is an essential element of due process of law. If that were so the procedure of the first half of the seventeenth century would be fastened upon the American jurisprudence like a straight-jacket, only to be unloosed by constitutional amendment. . . .

Third. But, consistently with the requirements of due process, no change in ancient procedure can be made which disregards those fundamental principles, to be ascertained from time to time by judicial action, which have relation to process of law and protect the citizen in

his private right, and guard him against the arbitrary action of government. . . .

The question under consideration may first be tested by the application of these settled doctrines of this court. If the statement of Mr. Justice Matthews, as elucidated in *Hurtado v. California* (110 U.S. 516, 528), is to be taken literally,¹⁴ that alone might almost be decisive. For nothing is more certain, in point of historical fact, than that the practice of compulsory self-incrimination in the courts and elsewhere existed for four hundred years after the granting of Magna Carta, continued throughout the reign of Charles I (though then beginning to be seriously questioned), gained at least some foothold among the early colonists of this country, and was not entirely omitted at trials in England until the eighteenth century. . . .

The question before us is the meaning of a constitutional provision which forbids the States to deny to any person due process of law. In the decision of this question we have the authority to take into account only those fundamental rights which are expressed in that provision, not the rights fundamental in citizenship, state or National, for they are secured otherwise, but the rights fundamental in due process and therefore an essential part of it. We have to consider whether the right is so fundamental in due process that a refusal of the right is a denial of due process. One aid to the solution of the question is to inquire how the right was rated during the time when the meaning of due process was in a formative state and before it was incorporated in American constitutional law. Did those who then were formulating and insisting upon the rights of the people entertain the view that the right was so fundamental that there could be no due process without it? It has already appeared that, prior to the formation of the American Constitution, in which the exemption from compulsory self-incrimination was specifically secured, separately, independently, and side by side with the requirement of due process, the doctrine was formed, as other doctrines of the law of evidence have been formed, by the course of decision in the courts covering a long period of time. . . . None of the great instruments in which we are accustomed to look for the declaration of the fundamental rights made reference to it. . . .

We pass by the meager records of the early colonial time. . . .

But the history of the incorporation of the privilege in an amendment to the National Constitution is full of significance in this connection. . . . The nine States requisite to put the Constitution in operation ratified it without a suggestion of incorporating this privilege. . . .

The decisions of this court, though they are silent on the precise

¹⁴ I.e., the rule that no process is forbidden that shows the sanction of settled usage.—Ed.

question before us, ought to be searched to discover if they present any analogies which are helpful in its decision. The essential elements of due process of law, already established by them, are singularly few, though of wide application and deep significance. . . . We need notice now only those cases which deal with the principles which must be observed in the trial of criminal and civil causes. . . .

. . . . The cases proceed upon the theory that, given a court of justice which has jurisdiction and acts, not arbitrarily but in conformity with a general law, upon evidence, and after inquiry made with notice to the parties affected and opportunity to be heard, then all the requirements of due process, so far as it relates to procedure in court and methods of trial and character and effect of evidence, are complied with. . . .

It is impossible to reconcile the reasoning of these cases and the rule which governed their decision with the theory that an exemption from compulsory self-incrimination is included in the conception of due process of law. . . .

Even if the historical meaning of due process and the decisions of this court did not exclude the privilege from it, it would be going far to rate it as an immutable principle of justice which is the inalienable possession of every citizen of a free government. Salutory as the principle may seem to the great majority, it cannot be ranked with the right to hearing before condemnation, the immunity from arbitrary power not acting by general laws, and the inviolability of private property. . . .

MR. JUSTICE HARLAN, dissenting. . . .

NOTE ON ACCESS TO ADMINISTRATIVE TRIBUNALS

Law courts exist primarily to settle disputes between private litigants. They decide questions of legal rights between private parties. In discharging this function, they not only apply the law; they construe it. The courts apply the law directly to the contestants concerned, in a concrete situation; they make the appropriate rule and decide the question before them one way or the other. This is the judicial function in its simplicity.

Under the American system of government, the judicial determination of the existence of a constitutional right has been closely assimilated to the traditional common law authority of the courts in cases where civil liberties are at issue. It is true that only one of the parties to the dispute is a private "person." It is true also that the validity of a statute is being challenged, and that the power of an agent of government to act is denied. These distinctions have force, but are not determining

for the point under consideration. What is controlling is that the private party is setting up against governmental infringement a right guaranteed to him by the paramount law. The form of the controversy is that of private litigation. The law affects him directly and immediately, without official intervention, to make certain conduct illegal, or to take away from him a right which he has hitherto possessed. The judicial function is exerted primarily to allocate rights, and not incidentally in the pursuance of some executive or legislative task.¹⁵

A different situation arises when the management of public affairs produces a clash between private and public interest. Private rights are constantly affected by governmental action in conducting the business of governing, in promoting the public welfare, and in pursuing public enterprise. The regulation of private enterprise and the administration of the laws touch the private individual and his property rights at all points. The adjudication of the controversies caused by this multifarious activity of government is chiefly in the hands of administrative tribunals.¹⁶ They decide questions of law and questions of fact. Their procedure is more flexible than that of the law courts, but the essential requirements of due process—notice and hearing—are there, and power to settle the controversy.¹⁷ The capacity of an administrative agency to try a case is called a quasijudicial function.¹⁸ The use of the term

¹⁵ For this distinction, see Warren H. Pillsbury, "Administrative Tribunals," 36 *Harv. Law Rev.* 405 (1923). Reprinted in *Selected Essays on Constitutional Law*, *op. cit.*, at p. 367.

¹⁶ The following quotation illustrates the range of administrative agencies:

"We have today administrative agencies regulating public utility corporations, businesses affected with a public interest, professions, trades and callings, rates and prices; laws for the protection of the public health and safety and the promotion of public convenience and advantage; examining boards and other bodies to pass on the competency, responsibility, or other qualifications of private schools, chauffeurs, engineers, surveyors, private detectives, real estate brokers, stockbrokers, teachers, chiropodists, nurses, public accountants (etc., etc.); also boards and commissions of education, public service commissions, probation commissions, . . . bank examiners, insurance departments, transit commissions, health boards, . . . child welfare boards, tax commissions, . . . building commissions, water power commissions, water control commissions, . . . agricultural commissions, . . . workmen's compensation and industrial commissions, . . . motion picture commissions; and in the United States the Interstate Commerce Commission, the Federal Trade Commission, the Railroad Labor Board, the various officers which supervise and regulate internal revenue, and many other persons and groups exercising a vast power that is granted in the most general and unrestrained terms. . . ." Marvin B. Rosenberry, "Administrative Law and the Constitution," 23 *Amer. Pol. Sci. Rev.* 32 (1929); *Selected Essays*, p. 109, at p. 115. If he were writing now he would have to add to his list the great agencies of the New Deal.

¹⁷ See Pillsbury, *ibid.*, at pp. 369 and 373; Ray A. Brown, "Administrative Commissions and the Judicial Power," 19 *Minn. Law Rev.* 261 (1935); *Selected Essays*, p. 384, at p. 402.

¹⁸ "Probably over ninety per cent of the matters coming before administrative agencies are disposed of informally with the acquiescence of the private interest

"quasi" is not to deny judicial authority to administrative courts. On the other hand, what its significance is, is not quite clear. Probably there is a two-fold meaning attached to it: it serves to exclude the congeries of administrative tribunals from the hierarchy of law courts, and it indicates the similarity between the two types of court, in respect to the power exerted or exercised by both.¹⁹

affected and without formal trial proceedings. This must be so or government could not function. There cannot be a trial to close every tax return, or to pay every social security or veteran's claim or to grant every license.

"The same is true in more controversial matters. In the first four years of its existence the National Labor Relations Board closed 12,227 cases, in only 8 per cent of which was it necessary to go to formal proceedings. . . .

"Where the mere institution of formal proceedings may be fatal to the private interest, as, for instance, in the issuance of stop orders by the Securities and Exchange Commission, holding up the registration of securities to be offered for sale, the agencies have developed informal procedures by which questions can be threshed out in advance, objections avoided and formal proceedings made unnecessary. . . .

"Administrative agencies have developed three aids to rule-making which are used singly or together—investigation by its own staff, informal discussion with outside interests affected, and public hearings. The first is all that is necessary when the question is one of interpretation of law and the field of choice is narrow. The second is successful when the interests involved are organized and united in view. The third is resorted to widely when interests clash and the subject is one affecting many people in a vital way. . . ." From a summary of the Report of the Attorney General's Committee on Administrative Procedure, prepared by Dean Acheson, chairman, and released by Attorney General Jackson. *New York Times*, January 25, 1941.

¹⁹ "It is . . . impossible . . . to include within one definition those issues that are inherently administrative, as it is to (define) those types of proceedings that are judicial in character." Ray A. Brown, *Administrative Commissions and the Judicial Power*, *ibid.*, p. 385. The writer, however describes six types of problems which have been made the subject of administrative determination. They are, shortly: 1. Where the individual has no direct and personal concern in the matter. 2. Where the individual is affected by a jural relation to the interest which the state is advancing. 3. Where the individual has a privilege which the state has power either to grant or to withhold. An example would be where the individual has a claim against the state. 4. Where the state, in the exercise of its police power, directly affects the individual's interests. 5. Where the state attempts to impose penalties by exercising a quasi-criminal function. 6. Where the state settles controversies between individuals by administrative means, as, for example, in cases under workmen's compensation laws.

"Administrative law is . . . not a supplement to constitutional law. It is a re-division of the various bodies of law which previously have been grouped under the head of constitutional law. The fact that the two forms of law are the same . . . is not seriously disputed." A. A. Berle, Jr., "The Expansion of American Administrative law," 30 *Harvard Law Rev.* 430 (1917); *Selected Essays*, *ibid.*, p. 128.

"We have here a partial re-division of the powers of sovereignty, not according to function but according to subject matter. . . . These new agencies . . . are neither legislative, executive, nor judicial; they are all three. . . ." Howard L. Bevis, "Administrative Commissions and the Administration of Justice," 2 *Univ. of Cincinnati Law Rev.* 1 (1928); *Selected Essays*, *ibid.*, p. 92.

"Why say that the power exercised by a board or commission is quasi-judicial and not judicial, when the only difference between what is admittedly the exercise

Judicial review of decisions in administrative cases can be had in practically all controversies where private rights are involved. Direct appellate review is ordinarily provided by statute. Review is also available indirectly by suits at law or in equity.²⁰ The former method is used where court records exist, that is, where the administrative agency holds an investigation and makes findings of fact. Otherwise, recourse must be to indirect review, as in a suit for damages. But the scope of review is still largely in the power of the court to define. Dickinson is of the opinion that the most important type of direct appellate review is that by writ of *certiorari*. It removes proceedings in a lower court to one of higher jurisdiction. He observes that it is the most usual method in the state jurisdictions for obtaining review of the orders of public service agencies, as, for instance, public utilities commissions and industrial accident boards. He notes, further, that "for some reason" this method has not secured a "footing" among the ordinary forms of review in the federal administration. Here, he says, the most important means is by some statutory form of injunction.²¹ This means, in practice, an action to set aside the order of an administrative agency. This method is, however, substantially like an appeal.

The purpose of judicial review of this character is to maintain some degree of control by the courts of administrative authorities. The extent to which review should go is a question extremely controversial and difficult. The heart of the problem is, whether the findings of fact made by an administrative commission (board) should be conclusive on a court of review, or whether the court should make its own independent investigation. The argument in favor of the finality of administrative findings of fact is clear: it is that these agencies are designed to be bodies of experts equipped to do the special tasks for which they are

of judicial power and the exercise of so-called quasi-judicial power is the subject matter with which the power deals? Rosenberg, *op. cit.*, p. 113.

"It is plain that administrative officers may be empowered to take specific action in executing the law on condition that the specific facts exist on which the law depends, and to take measures necessary to decide whether or not the facts do exist and whether or not the law does authorize action . . . , and that this involves no exercise of power judicial in such sense as to be non-administrative. However it is sometimes said that in such cases administrative officers act judicially, and the statement, though tending to confusion, is correct if it merely means that their mental processes resemble those of courts, or that due process may require a hearing, or that their resulting action may, like a judgment, be final, in that it may . . . confer a right which cannot be rescinded except for a distinct cause." Frederick Green, "Separation of Governmental Powers," 29 *Yale Law Jour.* 369 (1920); *Selected Essays, ibid.*, p. 209.

²⁰ See John Dickinson, "Judicial Control of Official Discretion," 22 *Amer. Pol. Sci. Rev.* 275 (1928); *Selected Essays, ibid.*, p. 957. Also, Nathan Isaacs, "Judicial Review of Administrative Findings," 30 *Yale Law Jour.* 781 (1921); *Selected Essays, ibid.*, p. 976.

²¹ *Ibid.*, *Selected Essays*, p. 972.

created, whereas judges are without any special training in such fields. This position is countered by the objection that administrative agencies possessing judicial powers must not be left free to move at their own discretion. The issue boils down at last to the permissible amount of administrative discretion, because the test of reasonableness may be a question of fact as well as a question of law, as, for example, whether a given rate is reasonable.²²

FEDERAL COMMUNICATIONS COMMISSION *v.* POTTSVILLE
BROADCASTING CO.

Supreme Court of the United States. 1940.
309 U.S. 134.

Certiorari to review an order which granted a writ of *mandamus* requiring the above-named Commission to set aside its order denying an application of the present respondent and assigning it for rehearing, with other applications for the same broadcasting facilities.

[By the Communications Act of 1934, as amended by the Act of May 20, 1937, (48 Stat. 1064 and 50 Stat. 189), Congress set up the Federal Communications Commission. In May, 1936, the Pottsville Broadcasting Company sought a permit from the Commission. The commission denied application because (1) the company was financially disqualified, and (2) because it did not sufficiently represent the local interests in the community it was to serve. The company then appealed to the court below, the Court of Appeals of the state of Pennsylvania. This court reversed the decision of the Commission on the first point and did not pass on the second. The company then petitioned the Commission to grant its original application. The Commission, however, set for argument the company's application along with two rival applications which had been filed after the date of the company's orig-

²² A useful line of cases in which this issue receives acute discussion would begin, perhaps, with *Smyth v. Ames*, 169 U.S. 466 (1898). It would run through *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287 (1920), *Crowell v. Benson*, 285 U.S. 22 (1932) and *St. Joseph Stock Yards Co. v. U.S.*, 298 U.S. 38 (1936), in which the doctrine of the jurisdictional fact is applied and expanded to warrant independent investigation by courts of administrative findings of fact; the latter case now seems to be the high water mark of this trend. From there the line would run to *Railroad Commission of Texas v. Rowan & Nichols Oil Co.*, 310 U.S. 573 (1940) and *Opp Cotton Mills, Inc. v. Administrator of the Wage and Hour Division of the Department of Labor*, 312 U.S. 126 (1941), where the Supreme Court refuses to supplant the judgment of an administrative agency by its own, and great latitude is permitted in admitting evidence which will satisfy due process.

inal petition. The Commission announced that it would judge all three on a comparative basis. At this stage of the proceedings the company obtained from the Court of Appeals the writ of *mandamus* now under review, ordering the Commission to hear the application of the company on the basis of the record originally made and in the light of the court's opinion.]

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

The court below issued a writ of mandamus against the Federal Communications Commission, and, because important issues of administrative laws are involved, we brought the case here. . . . We are called upon to ascertain and enforce the spheres of authority which Congress has given to the Commission and the courts, respectively, through its scheme for the regulation of radio broadcasting. . . .

The Court of Appeals invoked against the Commission the familiar doctrine that a lower court is bound to respect the mandate of an appellate tribunal and cannot reconsider questions which the mandate has laid at rest. . . . That proposition is indisputable, but it does not tell us what issues were laid at rest. . . . Nor is a court's interpretation of the scope of its own mandate necessarily conclusive. . . . Therefore, we would not be foreclosed by the interpretation which the Court of Appeals gave to its mandate, even if it had been directed to a lower court.

A much deeper issue, however, is here involved. This was not a mandate from court to court but from a court to an administrative agency. What is in issue is not the relationship of federal courts *inter se*—a relationship defined largely by the courts themselves—but the due observance by courts of the distribution of authority made by Congress as between its power to regulate commerce and the reviewing power which it has conferred upon the courts under Article III of the Constitution. A review by a federal court of the action of a lower court is only one phase of a single unified process. But to the extent that a federal court is authorized to review an administrative act, there is superimposed upon the enforcement of legislative policy through administrative control a different process from that out of which the administrative action under review ensued. The technical rules derived from the interrelationship of judicial tribunals forming a hierarchical system are taken out of their environment when mechanically applied to determine the extent to which Congressional power, exercised through a delegated agency, can be controlled within the limited scope of "judicial power" conferred by Congress under the Constitution.

Courts, like other organisms, represent an interplay of form and func-

tion. The history of Anglo-American courts and the more or less narrowly defined range of their staple business have determined the basic characteristics of trial procedure, the rules of evidence, and the general principles of appellate review. Modern administrative tribunals are the outgrowth of conditions far different from those. To a large degree they have been a response to the felt need of governmental supervision over economic enterprise—a supervision which could effectively be exercised neither directly through self-executing legislation nor by the judicial process. That this movement was natural and its extension inevitable, was a quarter century ago the opinion of eminent spokesmen of the law. Perhaps the most striking characteristic of this movement has been the investiture of administrative agencies with power far exceeding and different from the conventional judicial modes for adjusting conflicting claims—modes whereby interested litigants define the scope of the inquiry and determine the data on which the judicial judgment is ultimately based. Administrative agencies have power themselves to initiate inquiry, or, when their authority is invoked, to control the range of investigation in ascertaining what is to satisfy the requirements of the public interest in relation to the needs of vast regions and sometimes the whole nation in the enjoyment of facilities for transportation, communication and other essential public services. These differences in origin and function preclude wholesale transplantation of the rules of procedure, trial, and review which have evolved from the history and experience of courts. Thus, this Court has recognized that bodies like the Interstate Commerce Commission, into whose mould Congress has cast more recent administrative agencies, “should not be too narrowly constrained by technical rules as to the admissibility of proof,” *Interstate Commerce Commission v. Baird*, 194 U.S. 25, 44, should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties. Compare *New England Divisions Case*, 261 U.S. 184. To be sure, the laws under which these agencies operate prescribe the fundamentals of fair play. They require that interested parties be afforded an opportunity for hearing and that judgment must express a reasoned conclusion. But to assimilate the relation of these administrative bodies and the courts to the relationship between lower and upper courts is to disregard the origin and purposes of the movement for administrative regulation and at the same time to disregard the traditional scope, however farreaching, of the judicial process. Unless these vital differentiations between the functions of judicial and administrative tribunals are observed, courts will stray outside their province and read the laws of Congress through the distorting lenses of inapplicable legal doctrine. . . .

... "Whether the Commission applies the legislative standards validly set up, whether it acts within the authority conferred or goes beyond it, whether its proceedings satisfy the pertinent demands of due process, whether, in short, there is compliance with the legal requirements which fix the province of the Commission and govern its action, are appropriate questions for judicial decision." *Federal Radio Comm'n v. Nelson Bros. Co.*, 289 U.S. 266, 276.

On review the court may thus correct errors of law and on remand the Commission is bound to act upon the correction. . . . But an administrative determination in which is imbedded a legal question open to judicial review does not impliedly foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge. Cf. *Ford Motor Co. v. Labor Board*, 305 U.S. 364.

The Commission's responsibility at all times is to measure applications by the standard of "public convenience, interest, or necessity." The Commission originally found respondent's application inconsistent with the public interest because of an erroneous view regarding the law of Pennsylvania. The Court of Appeals laid bare that error, and, in compelling obedience to its correction, exhausted the only power which Congress gave it. At this point the Commission was again charged with the duty of judging the application in the light of "public convenience, interest, or necessity." The fact that in its first disposition the Commission had committed a legal error did not create rights of priority in the respondent, as against the later applicants, which it would not have otherwise possessed. Only Congress could confer such a priority. It has not done so. The Court of Appeals cannot write the principle of priority into the statute as an indirect result of its power to scrutinize legal errors in the first of an allowable series of administrative actions. . . .

... It is always easy to conjure up extreme and even oppressive possibilities in the exertion of authority. But courts are not charged with general guardianship against all potential mischief in the complicated tasks of government. The present case makes timely the reminder that "legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." *Missouri, K. & T. Ry. Co. v. May*, 194 U.S. 267, 270. Congress which creates and sustains these agencies must be trusted to correct whatever defects experience may reveal. Interference by the courts is not conducive to the development of habits of responsibility in administrative agencies. . . .

MR. JUSTICE McREYNOLDS concurs in the result.

*Freedom of Religion*WEST VIRGINIA STATE BOARD OF EDUCATION *v.* BARNETTE.

Supreme Court of the United States. 1943.
319 U.S. 624.

MR. JUSTICE JACKSON delivered the opinion of the Court.

Following the decision by this Court on June 3, 1940, in *Minersville School District v. Gobitis*, 310 U.S. 586, The West Virginia legislature amended its statute to require all schools therein to conduct courses of instruction in history, civics, and in the Constitutions of the United States and of the State. . . .

The Board of Education on January 9, 1942, adopted a resolution containing recitals taken largely from the Court's *Gobitis* opinion and ordering that the salute to the flag become "a regular part of the program of activities in the public schools," that all teachers and pupils "shall be required to participate in the salute honoring the Nation represented by the Flag; provided, however, that refusal to salute the Flag be regarded as an Act of insubordination, and shall be dealt with accordingly."

Failure to conform is "insubordination" dealt with by expulsion. Re-admission is denied by statute until compliance. Meanwhile the expelled child is "unlawfully absent" and may be proceeded against as a delinquent. His parents or guardians are liable to prosecution, and if convicted are subject to fine not exceeding \$50 and jail term not exceeding thirty days.

Appellees, citizens of the United States and of West Virginia, brought suit in the United States District Court for themselves and others similarly situated asking its injunction to restrain enforcement of these laws and regulations against Jehovah's Witnesses. The Witnesses are an unincorporated body teaching that the obligation imposed by law of God is superior to that of laws enacted by temporal government. Their religious beliefs include a literal version of Exodus, Chapter 20, verses 4 and 5, which says: "Thou shalt not make unto thee any graven image, or any likeness of anything that is in heaven above, or that is in the earth beneath, or that is in the water under the earth; thou shalt not bow down thyself to them nor serve them." They consider that the flag is an "image" within this command. For this reason they refuse to salute it.

Children of this faith have been expelled from school and are threat-

ened with exclusion for no other cause. Officials threaten to send them to reformatories maintained for criminally inclined juveniles. Parents of such children have been prosecuted and are threatened with prosecutions for causing delinquency.

The Board of Education moved to dismiss the complaint setting forth these facts and alleging that the law and regulations are an unconstitutional denial of religious freedom, and of freedom of speech, and are invalid under the "due process" and "equal protection" clauses of the Fourteenth Amendment to the Federal Constitution. The cause was submitted on the pleadings to a District Court of three judges. It restrained enforcement as to the plaintiffs and those of that class. The Board of Education brought the case here by direct appeal.

The freedom asserted by these appellees does not bring them into collision with rights asserted by any other individuals. . . . Nor is there any question in this case that their behavior is peaceable and orderly. The sole conflict is between authority and rights of the individual. The State asserts power to condition access to public education on making a prescribed sign and profession and at the same time to coerce attendance by punishing both parent and child. The latter stand on a right of self-determination in matters that touch individual opinion and personal attitude.

As the present Chief Justice said in dissent in the *Gobitis* case, the State may "require teaching by instruction and study of all in our history and in the structure and organization of our government, including the guaranties of civil liberty which tend to inspire patriotism and love of country." 310 U.S. at page 604. . . . Here, however, we are dealing with a compulsion of students to declare a belief. They are not merely made acquainted with the flag salute so that they may be informed as to what it is or even what it means. The issue here is whether this slow and easily neglected route to aroused loyalties constitutionally may be short-cut by substituting a compulsory salute and slogan. . . .

There is no doubt that, in connection with the pledges, the flag salute is a form of utterance. Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind. . . . A person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn.

It is also to be noted that the compulsory flag salute and pledge requires affirmation of a belief and an attitude of mind. It is not clear whether the regulation contemplates that pupils forego any contrary convictions of their own and become unwilling converts to the prescribed ceremony or whether it will be acceptable if they simulate

assent by words without belief and by a gesture barren of meaning. It is now a commonplace that censorship or suppression of expression of opinion is tolerated by our Constitution only when the expression presents a clear and present danger of action of a kind the State is empowered to prevent and punish. . . . But here the power of compulsion is invoked without any allegation that remaining passive during a flag salute ritual creates a clear and present danger that would justify an effort even to muffle expression. To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind.

Whether the First Amendment to the Constitution will permit officials to order observance of ritual of this nature does not depend upon whether as a voluntary exercise we would think it to be good, bad or merely innocuous. . . . If official power exists to coerce acceptance of any patriotic creed, what it shall contain cannot be decided by courts, but must be largely discretionary with the ordaining authority, whose power to prescribe would no doubt include power to amend. Hence validity of the asserted power to force an American citizen publicly to profess any statement of belief or to engage in any ceremony of assent to one presents questions of power that must be considered independently of any idea we may have as to the utility of the ceremony in question.

Nor does the issue as we see it turn on one's possession of particular religious views or the sincerity with which they are held. While religion supplies appellees' motive for enduring the discomforts of making the issue in this case, many citizens who do not share these religious views hold such a compulsory rite to infringe constitutional liberty of the individual. It is not necessary to inquire whether non-conformist beliefs will exempt from the duty to salute unless we first find power to make the salute a legal duty.

The Gobitis decision, however, *assumed*, as did the argument in that case and in this, that power exists in the State to impose the flag salute discipline upon school children in general. The Court only examined and rejected a claim based on religious beliefs of immunity from an unquestioned general rule. The question which underlies the flag salute controversy is whether such a ceremony so touching matters of opinion and political attitude may be imposed upon the individual by official authority under powers committed to any political organization under our Constitution. We examine rather than assume existence of this power and, against this broader definition of issues in this case, re-examine specific grounds assigned for the Gobitis decision. . . .

1. Government of limited power need not be anemic government.

Assurance that rights are secure tends to diminish fear and jealousy of strong government, and by making us feel safe to live under it makes for its better support. . . . To enforce those rights today is not to choose weak government over strong government. It is only to adhere as a means of strength to individual freedom of mind in preference to officially disciplined uniformity for which history indicates a disappointing and disastrous end. . . .

2. It was also considered in the *Gobitis* case that functions of educational officers in States, counties and school districts were such that to interfere with their authority "would in effect make us the school board for the country." *Id.*, 310 U.S. at page 598. . . .

The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. . . .

3. The *Gobitis* opinion reasoned that this is a field "where courts possess no marked and certainly no controlling competence," that it is committed to the legislatures as well as the courts to guard cherished liberties and that it is constitutionally appropriate to "fight out the wise use of legislative authority in the forum of public opinion and before legislative assemblies rather than to transfer such a contest to the judicial arena" *Id.*, 310 U.S. at page 597, 598, 600. . . .

The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

In weighing arguments of the parties it is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own sake. The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard. The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a "rational basis" for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. . . . It is important to note that while it is the Fourteenth Amendment which bears directly upon the State it is the

more specific limiting principles of the First Amendment that finally govern this case.

Nor does our duty to apply the Bill of Rights to assertions of official authority depend upon our possession of marked competence in the field where the invasion of rights occurs. True, the task of translating the majestic generalities of the Bill of Rights into concrete restraints on officials dealing with the problems of the twentieth century, is one to disturb self-confidence. . . . But we act in these matters not by authority of our competence but by force of our commissions. We cannot, because of modest estimates of our competence in such specialties as public education, withhold the judgment that history authenticates as the function of this Court when liberty is infringed.

4. Lastly, and this is the very heart of the Gobitis opinion, it reasons that "National unity is the basis of national security," that the authorities have "the right to select appropriate means for its attainment," and hence reaches the conclusion that such compulsory measures toward "national unity" are constitutional. *Id.*, 310 U.S. at page 595. . . . Upon the verity of this assumption depends our answer in this case.

National unity as an end which officials may foster by persuasion and example is not in question. The problem is whether under our Constitution compulsion as here employed is a permissible means for its achievement.

Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men. . . . As governmental pressure towards unity becomes greater, so strife becomes more bitter as to whose unity it shall be. Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing. . . . Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.

It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings. . . . Authority here is to be controlled by public opinion, not public opinion by authority.

The case is made difficult not because the principles of its decision are obscure but because the flag involved is our own. Nevertheless, we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization. . . .

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in poli-

tics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control. . . .

[This is another case where there is, strictly speaking, no opinion of the Court. Black, Douglas and Murphy, JJ., delivered concurring opinions, albeit very short ones. The dissent was comprised of Frankfurter, Roberts and Reed, JJ. Mr. Justice Frankfurter had spoken for a majority of the Court in the *Gobitis* case.]

The Equal Protection of the Laws

CENTRAL LUMBER *v.* SOUTH DAKOTA.

Supreme Court of the United States. 1912.
226 U.S. 157.

MR. JUSTICE HOLMES delivered the opinion of the court.

The plaintiff in error was found guilty of unfair discrimination under Session Laws of South Dakota for 1907, c. 131, and was sentenced to a fine of two hundred dollars and costs. . . . By the statute anyone "Engaged in the production, manufacture or distribution of any commodity in general use, that intentionally, for the purpose of destroying the competition of any regular, established dealer in such commodity, . . . shall discriminate between different sections, communities, or cities of this state, by selling such commodity at a lower rate in one section . . . than such person . . . charges for such commodity in another section, . . . after equalizing the distance from the point of production," &c, shall be guilty of the crime and liable to the fine.

The subject-matter, like the rest of the criminal law, is under the control of the legislature of South Dakota, by virtue of its general powers, unless the statute conflicts as alleged with the Constitution of the United States. The grounds on which it is said to do so are that it denies the equal protection of the laws, because it affects the conduct of only a particular class—those selling goods in two places in the State—and is intended for the protection of only a particular class—regular established dealers; and also because it unreasonably limits the liberty of people to make such bargains as they like.

On the first of these points it is said that an indefensible classification may be disguised in the form of a description of the act constituting the offense, and it is urged that to punish selling goods in one place lower than at another in effect is to select the class of dealers that have two places of business for a special liability, and in real fact is a blow aimed at those who have several lumber yards along a line of railroad, in the interest of independent dealers. All competition, it is added, imports an attempt to destroy or prevent the competition of rivals, and there is no difference in principle between the prohibited act and the ordinary efforts of traders at a single place. The premises may be conceded without accepting the conclusion that this is an unconstitutional discrimination. If the legislature shares the now prevailing belief as to what is public policy and finds that a particular instrument of trade war is being used against that policy in certain cases, it may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses, and it may do so none the less that the forbidden act does not differ in kind from those that are allowed. . . .

This is not the arbitrary selection that is condemned in such cases as *Southern Ry. Co. v. Greene*, 216 U.S. 400. The Fourteenth Amendment does not prohibit legislation special in character. . . . It does not prohibit a State from carrying out a policy that cannot be pronounced purely arbitrary, by taxation or penal laws. . . . If a class is deemed to present a conspicuous example of what the legislature seeks to prevent, the Fourteenth Amendment allows it to be dealt with although otherwise and merely logically not distinguishable from others not embraced in the law. . . . We must assume that the legislature of South Dakota considered that people selling in two places made the prohibited use of their opportunities and that such use was harmful, although the usual efforts of competitors were desired. It might have been argued to the legislature with more force than it can be to us that recoupment in one place of losses in another is merely an instance of financial ability to compete. If the legislature thought that that particular manifestation of ability usually came from great corporations whose power it deemed excessive and for that reason did more harm than good in their State, and that there was no other cause of frequent occurrence where the same could be said, we cannot review their economics or their facts. That the law embodies a widespread conviction appears from the decisions in other States. . . .

DOMINION HOTEL, INC., v. ARIZONA.

Supreme Court of the United States. 1919.
249 U.S. 265.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an information alleging that the defendant, the plaintiff in error, was engaged in the hotel business and permitted a woman to work in the hotel for eight hours and that the "said eight hours of work was not then and there performed within a period of twelve hours," with a denial that the defendant was within the exceptions made by the statute governing the case. The statute provides as follows: "Provided further, that the said eight hour period of work shall be performed within a period of twelve hours, the period of twelve hours during which such labor must be performed not to be applicable to railroad restaurants or eating houses located upon railroad rights of way and operated by or under contract with any railroad company." There was a trial and judgment against the defendant which was sustained by the Supreme Court of the State, Arizona.

The Fourteenth Amendment is not a pedagogical requirement of the impracticable. The equal protection of the laws does not mean that all occupations that are called by the same name must be treated in the same way. The power of the State "may be determined by degrees of evil or exercised in cases where detriment is especially experienced." *Armour & Co. v. North Dakota*, 240 U.S. 510, 517. . . . It may do what it can to prevent what is deemed an evil and stop short of those cases in which the harm to the few concerned is thought less important than the harm to the public that would ensue if the rule laid down were made mathematically exact. The only question is whether we can say on our judicial knowledge that the legislature of Arizona could not have had any reasonable ground for believing that there were such public considerations for the distinction made by the present law. The deference due to the judgment of the legislature on the matter has been emphasized again and again. . . . Of course, this is especially true when local conditions may affect the answer, conditions that the legislature does but that we cannot know. . . .

Presumably, or at least possibly, the main custom of restaurants upon railroad rights of way comes from the passengers upon trains that stop to allow them to eat. The work must be adjusted to the hours of the trains. This fact makes a practical and, it may be, an important distinction between such restaurants and others. If in its theory the distinction is justifiable, as for all that we know it is, the fact that some cases,

including the plaintiff's, are very near to the line makes it none the worse. That is the inevitable result of drawing a line where the distinctions are distinctions of degree; and the constant business of the law is to draw such lines. "Upholding the act as embodying a principle generally fair and doing as nearly equal justice as can be expected seems to import that if a particular case of hardship arises under it in its natural and ordinary application, that hardship must be borne as one of the imperfections of human things." *Louisville & Nashville R. R. Co. v. Barber Asphalt Co.*, 197 U.S. 430, 434. . . . We cannot pronounce the statute void.

CHAPTER III

The Inviolability of Contracts

PROPERTY RIGHTS

There has always been a profound dualism underlying the life of men and women in politically organized society. It is the dualism of Life and Property. The problem of the relationship of these two is as ineluctable as the problem of that other dualism, Good and Evil.

At the beginning, it is not hard to separate the two. Life means existence, living. To safeguard life, the first thing to do is to protect one's body. This need is so elementary that it is thought of as a right, and as a right inherent in the nature of human life. It finds expression in the right of self-defense against physical violence—against attack. Thus it is among the first duties of government to afford protection to the citizenry against bodily injury. But experience with government early showed the people that government could itself injure and kill. It could do so either arbitrarily or under the forms of law. Consequently the right to personal safety had to be directed against government also. Bills of rights have this primary purpose of protecting one's body and one's life against the hazards of uncontrolled force.

Hamilton argued ¹ that the Constitution, as it went to the states, contained the equivalent of a bill of rights. He cited Article I, the provisions providing for impeachment (3.7); the guarantee of the ancient writ of *habeas corpus*, and the prohibition of bills of attainder and *ex post facto* laws (9.2 and 9.3); the prohibition of titles of nobility (9.7); and, in Article III, the guaranty of trial by jury in cases of all crimes (2.3), and the definition of treason with the limitation of the punishment therefor (2.3). These are, each of them, restrictions on the federal government and are directed to the bodily security of the citizenry.

The people, however, were not satisfied, and added eight more amendments, each one of which protects the safety of person.²

¹ *The Federalist*, LXXXIV.

² The first amendment, guaranteeing the freedom of religion, speech, the press, and peaceable assembly, is thought of today as protecting democratic processes, rather than as a safeguard against brutality. One has, however, only to recall the time-honored practice of irritated governments of wrecking printing presses, outlawing congregations, and dispersing meetings, with the accompanying hazards to life and limb, to see the point of the guarantees therein contained.

Similarly, the idea of property is simple, in the beginning. It starts with one's household possessions and includes at once the products of one's labor,³ if one works for oneself. If one works for somebody else, the income thus earned provides the means to acquire things, and the income itself is property. So, property is something easy to understand and to get at; it is land, houses, goods, things, money, which are owned by somebody. But one owns things for some reason. One wants to use them in some way. Therefore, the right to use them is a property right. The right to own is separate from the right to use because it is serviceable to treat them so. When a man rents an apartment he uses it but he does not own it, while the landlord owns it, but does not himself use it. Furthermore, the landlord may have mortgaged the apartment to a bank. The bank then has a property right in the apartment to the extent of the loan. And the tenant may be paying the rental of the apartment to the bank, by arrangement between all three parties to the proceeding, to discharge the mortgage. In this instance the landlord is availing himself of still another property right, the power to dispose of one's property. He might end his ownership of the apartment, too, if he wished and could find a purchaser.

It is not difficult to perceive that the word "property" has come to mean the rights of ownership and control, together with those interests derivative either from them or the actual things themselves. Thus there is a two-fold meaning to the word. A corner lot is a piece of property; but an interest in, or a right to, that property, is itself property, or, at least, a property right.

It is not hard to see, either, that anything which may be owned comes within the term "property." A right to do something may be a property right, if it derives from ownership. The right to work, or to pursue a common calling to gain one's livelihood, is a property right within certain conditions.⁴

The end of this progression is, that promises, agreements and arrangements which are made between individuals or corporate bodies, *may* be property and confer property rights. Some contracts may be very valuable pieces of property. Or they may create property rights. Thus the word, "property," is at last an abstraction, a term to denote a network of relationships. Relationships which are reduced to a contract become binding on the parties to it, and the performance of it may be compelled

³ As John Locke put it: "The 'labour' of his body and the 'work' of his hands, we may say, are properly his. Whatsoever, then, he removes out of the state that Nature hath provided and left it in, he hath mixed his labour with it, and joined to it something that is his own, and thereby makes it his property." *Second Treatise on Civil Government*, ch. V., sec. 26.

⁴ Berle and Means, *The Modern Corporation and Private Property* (New York, 1933), ch. I, and pp. 284 ff.

at law. In modern life, with its manifold complexity, the contract has become the basis of both economic and social organization.

It is proper, then, to take up now the second great concept of the Constitution, the inviolability of contracts. The cases begin with the classic statement of the principle in *Sturges v. Crowninshield*. Marshall's doctrine there has become embedded, as the phrase goes, in the jurisprudence of the Supreme Court. Then the road divides. On the one side are the cases which involve the granting of corporate charters: the *Dartmouth College Case*, the *Charles River Bridge Co. Case*, and *Stone v. Mississippi*. On the other are the cases where private contracts are distributed. These begin with *Ogden v. Saunders*, the leading case, and end with *W. B. Worthen Co. v. Kavanaugh*.

Here is discernible that dualism between Life and Property which was made the subject of remark at the beginning of this chapter. The task of preserving life has gone far beyond that stage where simple frugality demanded preëminently only safety from physical aggression, to be allowed to pursue one's way in peace and security. Now society is dominant, with its own struggles to control. The individual is a member of society, and his value is commensurate therewith. At the same time, his independence is conditioned by the same fact—his membership in society—so that he can not be left to prosecute his ways in a manner deemed harmful to social interests and to the public welfare. The pursuit of life, liberty, property and happiness must be kept within bounds. He must not be left to fall into misery, but at the same time he must not be accorded license to injure society. If one turns from the individual to property, one finds the same antinomy. The maintenance of vested rights is essential to the course of society. But insistence on those rights must not be upheld in the face of the public interest. To maintain social and economic stability, the sanctity of contracts must be protected; but if doing so destroys the individual, then the welfare of society is hurt. Both the member of society and his property must be guarded, each for the sake of the other.

These cases come from the state jurisdictions. The principle of the inviolability of contracts receives statement in the Constitution as against the states only. The provision is to be found as follows, in I.10.1: "No State shall . . . pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts." The federal government is not forbidden to impair the obligation of contracts. It is not clear why a parallel prohibition was not laid on Congress. Possibly it was thought that a government created particularly to protect private property and to promote business would not need such a restriction. Or, perhaps the framers of the Constitution and their following were preoccupied with the record which the states had made and were concerned only with

putting a stop to it as definitely as possible. However that may be, the Constitution is silent here.

Nevertheless, the point had to come up, and it did so. It became the task of the Supreme Court to remedy the omission (if it were an omission) as best it could. Put differently, the Supreme Court found it necessary to extend the principle of the inviolability of contracts to the federal government, without any direct prohibition on which to rely. How it worked out the problem is indicated in the cases remaining in this section. All of the cases selected show a direct impact of legislation on a contract. In each one, the purpose of the legislation involved was to modify the terms of a contract. This type of enactment is to be distinguished from that in which interference with contractual obligations is incidental to the accomplishment of a different objective. Where indirect or resultant infringement of contracts is resisted, although the obligation of contracts and the equal protection of the laws may be invoked (simply to leave no stone unturned), the ordinary challenge is made by way of invoking due process; if not due process, then the separation of powers, or dual federalism. Later chapters will provide the specific outlines of this problem.

The General Principle

STURGES *v.* CROWNINSHIELD.

Supreme Court of the United States. 1819.

4 Wheaton 122.

[Crowninshield had made out two promissory notes payable to Sturges. The notes were dated at New York, March 22, 1811. The legislature of New York passed an insolvency act on April 3, 1811. When the time for the payment of the notes came the following August, Crowninshield sought to avail himself of the act. He obtained a certificate of discharge, February 15, 1812.]

MARSHALL, CH. J., delivered the opinion of the court. . . .

We proceed to the great question on which the cause must depend. Does the law of New York, which is pleaded in this case, impair the obligation of contracts, within the meaning of the constitution of the United States? This act liberates the person of the debtor, and discharges him from all liability for any debt previously contracted, on his surrendering his property in the manner it prescribes.

In discussing the question, whether a State is prohibited from passing

such a law as this, our first inquiry is into the meaning of words in common use—what is the obligation of a contract? and what will impair it? A contract is an agreement, in which a party undertakes to do, or not to do, a particular thing. The law binds him to perform his undertaking, and this is, of course, the obligation of his contract. In the case at bar, the defendant has given his promissory note to pay the plaintiff a sum of money on or before a certain day. The contract binds him to pay that money on that day; and this is its obligation. Any law which releases a part of this obligation, must, in the literal sense of the word, impair it. Much more must a law impair it, which makes it totally invalid, and entirely discharges it. . . . Industry, talents and integrity constitute a fund which is as confidently trusted as property itself. Future acquisitions are, therefore, liable for contracts; and to release them from this liability impairs their obligation.⁵

The constitution does not grant to the States the power of passing bankrupt laws, or any other power; but finds them in possession of it, and may either prohibit its future exercise entirely, or restrain it so far as national policy may require. It has so far restrained it, as to prohibit the passage of any law impairing the obligation of contracts. Although, then, the States may, until that power shall be exercised by congress, pass laws concerning bankrupts; yet they cannot constitutionally introduce into such laws a clause which discharges the obligations the bankrupt has entered into. It is not admitted, that, without this principle, an act cannot be a bankrupt law; and if it were, that admission would not change the constitution, nor exempt such acts from its prohibitions. . . .

The argument which has been pressed most earnestly at the bar, is that although all legislative acts which discharge the obligation of a contract, without performance, are within the very words of the constitution, yet an insolvent act, containing this principle, is not within its spirit, because such acts have been passed by colonial and state legislatures from the first settlement of the country, and because we know from the history of the times, that the mind of the convention was directed to other laws which were fraudulent in their character, which enabled the debtor to escape from his obligation, and yet hold his property, not to this, which is beneficial in its operation. . . .

The fact is too broadly stated. The insolvent laws of many, indeed, of by far the greater number of the States, do not contain this principle.

⁵ The student may watch profitably for extraneous remarks inserted in the course of an opinion or argument. This sentence is a conspicuous example of such observations. It is termed an *obiter dictum*; by which is meant that it is not pertinent to the issue. The issue before the court was, whether a state could pass an insolvency law which applied to contracts made *before* its enactment. Marshall stepped outside the controversy, and therefore spoke *obiter*. Such *dicta* are not binding. See *Ogden v. Saunders*, below.—Ed.

They discharge the person of the debtor, but leave his obligation to pay in full force. To this the constitution is not opposed.

But were it even true, that this principle had been introduced generally into those laws, it would not justify our varying the construction of the section. Every State in the Union, both while a colony and after becoming independent, had been in the practice of issuing paper money; yet this practice is in terms prohibited. . . . It is not admitted that the prohibition is more express in the one case than in the other. It does not, indeed, extend to insolvent laws by name, because it is not a law by name, but a principle which is to be forbidden. . . .

The fair, and we think, the necessary construction of the sentence requires, that we should give these words their full and obvious meaning. A general dissatisfaction with that lax system of legislation which followed the war of our revolution undoubtedly directed the mind of the convention to this subject. It is probable, that laws such as those which have been stated in argument, produced the loudest complaints, were most immediately felt. The attention of the convention, therefore, was particularly directed to paper money, and to acts which enabled the debtor to discharge his debt, otherwise than was stipulated in the contract. Had nothing more been intended, nothing more would have been expressed. But, in the opinion of the convention, much more remained to be done. The same mischief might be effected by other means. To restore public confidence completely, it was necessary, not only to prohibit the use of particular means by which it might be effected, but to prohibit the use of any means by which the same mischief might be produced. The convention appears to have intended to establish a great principle, that contracts should be inviolable. The constitution, therefore, declares, that no State shall pass "any law impairing the obligations of contracts."

If, as we think, it must be admitted, that this intention might actuate the convention; that it is not only consistent with, but is apparently manifested by, all that part of the section which respects this subject; that the words used are well adapted to the expression of it; that violence would be done to their plain meaning, by understanding them in a more limited sense; those rules of construction, which have been consecrated by the wisdom of ages, compel us to say, that these words prohibit the passage of any law discharging a contract, without performance. . . .

This opinion is confined to the case actually under consideration. It is confined to a case in which a creditor sues in a court, the proceedings of which, the legislature, whose act is pleaded, had not a right to control, and to a case where the creditor had not proceeded to execution against the body of his debtor, within the State whose law attempts to absolve a confined insolvent debtor from his obligation. . . .

*Corporate Charters as Contracts*DARTMOUTH COLLEGE *v.* WOODWARD.

Supreme Court of the United States. 1819.

4 Wheaton 518.

MARSHALL, C. J., delivered the opinion of the court, as follows:—

This is an action of trover, brought by the Trustees of Dartmouth College, against William H. Woodward, in the state court of New Hampshire, for the book of records, corporate seal, and other corporate property, to which the plaintiffs allege themselves to be entitled.

A special verdict . . . finds for the defendant, if certain acts of the legislature of New Hampshire, passed on the 27th of June, and on the 18th of December, 1816, be valid, and binding on the trustees without their assent, and not repugnant to the constitution of the United States; otherwise it finds for the plaintiffs.

The superior court of judicature of New Hampshire rendered a judgment upon this verdict for the defendant, which judgment has been brought before this court by writ of error. The single question now to be considered is, do the acts to which the verdict refers violate the constitution of the United States? . . .

The title of the plaintiffs originates in a charter, dated the 13th day of December, in the year 1769, incorporating twelve persons . . . by the name of "The Trustees of Dartmouth College," granting to them and their successors the usual corporate privileges and powers, and authorizing the trustees, who are to govern the college, to fill up all vacancies which may be created in their own body.

The defendant claims under three acts of the legislature of New Hampshire, the most material of which was passed on the 27th of June, 1816, and is entitled, "An act to amend the charter, and enlarge and improve the corporation of Dartmouth College." Among other alterations in the charter, this act increases the number of trustees to twenty-one, gives the appointment of the additional members to the executive of the State, and creates a board of overseers, with power to inspect and control the most important acts of the trustees. . . .

The majority of the trustees of the college have refused to accept this amended charter, and have brought this suit for the corporate property, which is in the possession of a person [Woodward] holding by virtue of the acts which have been stated.

It can require no argument to prove, that the circumstances of this

case constitute a contract. An application is made to the crown for a charter to incorporate a religious and literary institution. In the application it is stated, that large contributions have been made for the object, which will be conferred on the corporation, as soon as it shall be created. The charter is granted, and on its faith the property is conveyed. Surely, in this transaction, every ingredient of a complete and legitimate contract is to be found.

The points for consideration are,

1. Is this contract protected by the constitution of the United States?
2. Is it impaired by the acts under which the defendant holds?

1. On the first point it has been argued, that . . . (t)aken in its broad unlimited sense, the clause would be an unprofitable and vexatious interference with the internal concerns of a State, would unnecessarily and unwisely embarrass its legislation, and render immutable those civil institutions which are established for purposes of internal government, and which, to subserve those purposes, ought to vary with varying circumstances. That as the framers of the constitution could never have intended to insert in that instrument a provision so unnecessary, so mischievous, and so repugnant to its general spirit, the term "contract" must be understood in a more limited sense. That it must be understood as intended to guard against a power of at least doubtful utility, the abuse of which had been extensively felt; and to restrain the legislature in future from violating the right to property. That anterior to the formation of the constitution, a course of legislation had prevailed in many, if not in all, of the States, which weakened the confidence of man in man, and embarrassed all transactions between individuals, by dispensing with a faithful performance of engagements. To correct this mischief, by restraining the power which produced it, the State legislatures were forbidden "to pass any law impairing the obligation of contracts," that is, of contracts respecting property, under which some individual could claim a right to something beneficial to himself; and that since the clause in the constitution must, in construction, receive some limitation, it may be confined, and ought to be confined, to cases of this description; to cases within the mischief it was intended to remedy.

The general correctness of these observations cannot be controverted.

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The parties in this case differ less on general principles, less on the true construction of the constitution in the abstract, than on the application of those principles to this case, and on the true construction of the charter of 1769. This is the point on which the cause essentially depends. If the act of incorporation be a grant of political power, if it create a civil institution to be employed in the administration of the government,

or if the funds of the college be public property, or if the State of New Hampshire, as a government, be alone interested in its transactions, the subject is one in which the legislature of the State may act according to its own judgment, unrestrained by any limitation of its power imposed by the constitution of the United States.

But if this be a private eleemosynary institution, endowed with a capacity to take property for objects unconnected with government, whose funds are bestowed by individuals on the faith of the charter; if the donors have stipulated for the future disposition and management of those funds in the manner prescribed by themselves; there may be more difficulty in the case, although neither the persons who have made these stipulations, nor those for whose benefit they were made, should be parties to the cause. Those who are no longer interested in the property, may yet retain such an interest in the preservation of their own arrangements, as to have a right to insist that those arrangements shall be held sacred. Or, if they had themselves disappeared, it becomes a subject of serious and anxious inquiry, whether those whom they have legally empowered to represent them forever, may not assert all the rights which they possessed, while in being; whether, . . . the trustees be not so completely their representatives in the eye of the law, as to stand in their place. . . .

A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created. Among the most important are immortality, and, if the expression may be allowed, individuality; properties by which a perpetual succession of many persons are considered as the same, and may act as a single individual. They enable a corporation to manage its own affairs, and to hold property without the perplexing intricacies, the hazardous and endless necessity of perpetual conveyances, for the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men, in succession, with these qualities and capacities, that corporations were invented, and are in use. By these means a perpetual succession of individuals are capable of acting for the promotion of the particular object, like one immortal being. But this being does not share in the civil government of the country, unless that be the purpose for which it was created. Its immortality no more confers on it political power, or a political character, than immortality would confer such power or character on a natural person. It is no more a State instrument, than a natural person exercising the same powers would be. . . .

The objects for which a corporation is created are universally such

as the government wishes to promote. They are deemed beneficial to the country; and this benefit constitutes the consideration, and, in most cases, the sole consideration, of the grant. In most eleemosynary institutions, the object would be difficult, perhaps unattainable, without the aid of a charter of incorporation. . . . If the advantages to the public constitute a full compensation for the faculty it gives, there can be no reason for exacting a further compensation, by claiming a right to exercise over this artificial being a power which changes its nature, and touches the fund, for the security and application of which it was created. There can be no reason for implying in a charter, given for a valuable consideration, a power which is not only not expressed, but is in direct contradiction to its express stipulations. . . .

From this review of the charter, it appears, that Dartmouth College is an eleemosynary institution, incorporated for the purpose of perpetuating the application of the bounty of the donors, to the specified objects of that bounty; that its trustees or governors were originally named by the founder, and invested with the power of perpetuating themselves; that they are not public officers, nor is it a civil institution, participating in the administration of government; but a charity school, or a seminary of education, incorporated for the preservation of its property, and the perpetual application of that property to the objects of its creation. . . .

This is plainly a contract to which the donors, the trustees, and the crown, (to whose rights and obligations New Hampshire succeeds,) were the original parties. It is a contract made on a valuable consideration. It is a contract for the security and disposition of property. It is a contract, on the faith of which, real and personal estate has been conveyed to the corporation. It is then a contract within the letter of the constitution, and within its spirit also. . . .

It is more than possible that the preservation of rights of this description was not particularly in the view of the framers of the constitution, when the clause under consideration was introduced into that instrument. . . . It is not enough to say, that this particular case was not in the mind of the convention, when the article was framed, nor of the American people, when it was adopted. It is necessary to go further, and to say that, had this particular case been suggested, the language would have been so varied as to exclude it, or it would have been made a special exception. The case being within the words of the rule, must be within its operation likewise, unless there be something in the literal construction so obviously absurd or mischievous, or repugnant to the general spirit of the instrument, as to justify those who expound the constitution in making it an exception.

On what safe and intelligible ground can this exception stand. There

is no expression in the constitution, no sentiment delivered by its contemporaneous expounders, which would justify us in making it. . . .

2. We next proceed to the inquiry, whether its obligation has been impaired by those acts of the legislature of New Hampshire, to which the special verdict refers. . . .

On the effect of this law, two opinions cannot be entertained. . . . The whole power of governing the college is transferred from the trustees, appointed according to the will of the founder, expressed in the charter, to the executive of New Hampshire. . . . The will of the State is substituted for the will of the donors, in every essential operation of the college. This is not an immaterial change. . . .

It follows from this opinion, that the acts of the legislature of New Hampshire . . . are repugnant to the constitution of the United States. . . .

WASHINGTON, J. . . . If a doubt could exist that a grant is a contract, the point was decided in the case of *Fletcher v. Peck*, 6 C. 87. . . .

STORY, J. . . . When, then, the argument assumes that, because the charity is public, the corporation is public, it manifestly confounds the popular with the strictly legal sense of the terms. . . .

In the case of *Fletcher v. Peck*, 6 C. 87, 136, this court laid down its exposition of the word "contract," in this clause, in the following manner: "A contract is a compact between two or more persons, and is either executory or executed. An executory contract, is one in which a party binds himself to do or not to do a particular thing. A contract executed, is one in which the object of the contract is performed; and this, says Blackstone, differs in nothing from a grant. A contract executed, as well as one that is executory, contains obligations binding on the parties. A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right. A party is always estopped by his own grant." This language is perfectly unambiguous, and was used in reference to a grant of land by the governor of a State under a legislative act. It determines, in the most unequivocal manner, that the grant of a State is a contract within the clause of the constitution now in question, and that it implies a contract not to reassume the rights granted. *A fortiori*, the doctrine applies to a charter or grant from the king. . . .

CHARLES RIVER BRIDGE CO. v. WARREN BRIDGE CO.

Supreme Court of the United States. 1837.

11 Peters 420.

[In 1650 the legislature of Massachusetts granted to Harvard College the right to "dispose" of a ferry between Charlestown and Boston. In 1785 the legislature incorporated the Charles River Bridge Co. for the purpose of building a toll bridge at "the place where the ferry was then kept." By the terms of the company's charter it was to pay a fixed sum annually to the College. This it did.

In 1828 the legislature of Massachusetts incorporated the Warren Bridge Co., to build a bridge only 16 rods at its entrance on the Charlestown side from the toll bridge, and about fifty rods from the exit of the toll bridge on the Boston side. The company was authorized to charge tolls until the costs of construction and maintenance had been met; the bridge was then to be surrendered to the State.

The Charles River Bridge Co. sought to obtain an injunction to prevent the erection of the new bridge, on the ground that the project impaired the obligation of the contract between Massachusetts and the proprietors of the bridge. Litigation was protracted; the new bridge was completed and opened to traffic; the proprietors were reimbursed for their expenses from the receipts of the tolls; the bridge became the property of the State, and the State made it a free bridge. Thus the value of the franchise granted to the Charles River Bridge Co. was destroyed.]

TANEY, C. J., delivered the opinion of the court. . . .

The plaintiffs in error insist mainly upon two grounds: 1. That by virtue of the grant of 1650, Harvard College was entitled, in perpetuity, to the right of keeping a ferry between Charlestown and Boston; that this right was exclusive; and that the legislature had not the power to establish another ferry on the same line of travel, because it would infringe the rights of the college; 2. That, independently of the ferry right the acts of the legislature of Massachusetts of 1785, and 1792, by their true construction, necessarily implied that the legislature would not authorize another bridge by the side of this ; and the plaintiffs in error contend that the grant of the ferry to the college, and of charter to the proprietors of the bridge, are both contracts on the part of the State; and that the law authorizing the erection of the Warren Bridge, in 1828, impairs the obligation of these contracts.

It is very clear that in the form in which this case comes before us,

being a writ of error to a state court, the plaintiffs in claiming under either of these rights must place themselves on the ground of contract, and cannot support themselves upon the principle that the law divests vested rights. It is well settled by the decisions of this court that a state law may be retrospective in its character, and may divest vested rights, and yet not violate the constitution of the United States, unless it also impairs the obligation of a contract. . . .

But upon what ground can the plaintiffs in error contend that the ferry rights of the college have been transferred to the proprietors of the bridge? It is not suggested that there ever was, in point of fact, a deed of conveyance executed by the college to the bridge company. Is there any evidence in the record from which such a conveyance may, upon legal principle, be presumed? The testimony before the court, so far from laying the foundation for such a presumption, repels it in the most positive terms. . . . The ferry, with all its privileges was tended to be forever at an end, and a compensation in money was given in lieu of it. . . .

. . . . This annual sum was intended to be paid out of the proceeds of the tolls, which the company were authorized to collect. The amount of the tolls, it must be presumed, was graduated with a view to this incumbrance. . . . The tolls were to be collected from the public. . . .

Neither can the extent of the preëxisting ferry right have any influence upon the construction of the written charter for the bridge. It does not, by any means, follow, that because the legislative power in Massachusetts, in 1650, may have granted to a justly favored seminary of learning, the exclusive right of ferry between Boston and Charlestown, they would, in 1785, give the same extensive privilege to another corporation, who were about to erect a bridge in the same place. The fact that such a right was granted to the college, cannot by any sound rule of construction, be used to extend the privileges of the bridge company beyond what the words of the charter naturally and legally import. . . .

This brings us to the act of the legislature of Massachusetts, of 1785, and it is here that we must look for the extent and nature of the franchise conferred upon the plaintiffs.

. . . . The court think there can be no serious difficulty on that head. It is the grant of certain franchises by the public to a private corporation, and in a matter where the public interest is concerned. The rule of construction in such cases is well settled. . . . "This, like many other cases, is a bargain between a company of adventurers and the public, the terms of which are expressed in the statute; and the rule of construction in all such cases, is now fully established to be this: that any ambiguity in the terms of the contract, must operate against the adventurers, and in favor

of the public, and the plaintiffs can claim nothing that is not clearly given them by the act."

Adopting the rule of construction above stated as the settled one, we proceed to apply it to the charter of 1785, to the proprietors of the Charles River Bridge. It confers on them the ordinary faculties of a corporation, for the purpose of building the bridge; and establishes certain rates of toll, which the company are authorized to take. This is the whole grant. There is no exclusive privilege given to them over the waters of Charles River, above or below their bridge. No right to erect another bridge themselves, nor to prevent other persons from erecting one. No engagement from the State that another shall not be erected. If the plaintiff is entitled to them, it must be implied, simply, from the nature of the grant; and cannot be inferred from the words by which the grant is made. . . .

The inquiry then is, Does the charter contain such a contract on the part of the State? The rule of construction before stated is an answer to the question. In charters of this description, no rights are taken from the public, or given to the corporation, beyond those which the words of the charter, by their natural and proper construction, purport to convey. . . .

Indeed, the practice and usage of almost every State in the Union, old enough to have commenced the work of internal improvement, is opposed to the doctrine contended for on the part of the plaintiffs in error. Turnpike roads have been made in succession on the same line of travel. In some cases, railroads have rendered the turnpike roads on the same line of travel so entirely useless, that the franchise of the turnpike corporation is not worth preserving. Yet in none of these cases have the corporations supposed that their privileges were invaded, or any contract violated on the part of the State. We cannot deal thus with the rights reserved to the States, and by legal intendments and mere technical reasoning, take away from them any portion of that power over their own internal police and improvement, which is so necessary to their well being and prosperity. . . .

(The opinion of M'Lean, J., is omitted.)

STORY, J., dissenting. . . .

Is the charter to receive a strict or a liberal construction? Are any implications to be made, beyond the express terms? No one doubts that the charter is a contract, and a grant. . . .

. . . . Under such circumstances, I feel myself constrained to go at large into the doctrine of the common law in respect to royal grants. . . .

But what is most material to be stated, is, that all this doctrine in relation to the king's prerogative of having a construction in his own favor, is exclusively confined to cases of mere donation, flowing from the bounty of the crown. Whenever the grant is upon a valuable consideration, the rule of construction ceases; and the grant is expounded exactly as it would be in the case of a private grant, favorably to the grantee. Why is this rule adopted? Plainly, because the grant is a contract, and it is to be interpreted according to its fair meaning. . . .

I admit that, where the terms of a grant are to impose burdens upon the public, or to create a restraint injurious to the public interest, there is sound reason for interpreting the terms, if ambiguous, in favor of the public. . . .

But I do not insist upon any extraordinary liberality in interpreting this charter. All I contend for is that it shall receive a fair and reasonable interpretation; so as to carry into effect the legislative intention, and to secure to the grantees a just security for their privileges. . . .

Now, I put it to the common sense of every man, whether if at the moment of granting the charter the legislature had said to the proprietors, you shall build the bridge, you shall bear the burdens, and yet we will not even guarantee you any certainty of receiving any tolls. On the contrary, we reserve to ourselves the full power and authority to erect other bridges, toll or free bridges, contiguous to yours, who would have accepted such a charter upon such terms?

But it is said, if this is the law, what then is to become of turnpikes and canals? The answer is plain. Every turnpike has its local limits and local *termini*; its points of beginning and of end. No one ever imagined that the legislature might grant a new turnpike, with exactly the same location and *termini*. . . . The *termini* being different, the grants are or may be substantially different. . . .

But then again, it is said, that all this rests upon implication, and not upon the words of the charter. I admit that it does; but I again say, that the implication is natural and necessary. It is indispensable to the proper effect of the grant. . . .

Besides, in this very case, it is admitted on all sides, that, from the defective language and wording of the charter, no power is directly given to the proprietors to erect the bridge; and yet it is agreed that the power passes by necessary implication from the grant, for otherwise it would be utterly void. The argument, therefore, surrenders the point as to the propriety of making implications; and reduces the question to the mere consideration of what is a necessary implication. Now, I would willingly put the whole case upon this point, whether it is not indispensable to the fair and full operation of the grant, that the plaintiffs should be secure in the full enjoyment of their right to tolls. . . .

The truth is, that the whole argument of the defendants turns upon an implied reservation of power in the legislature to defeat and destroy its own grant.⁶ . . .

(Thompson, J., concurs.)

STONE v. MISSISSIPPI.

Supreme Court of the United States. 1879.

101 U.S. 814.

[The legislature of Mississippi granted a charter in 1867 to a certain lottery company. According to the terms of the act of incorporation the lottery company paid to the State \$5000 when it received the charter, and an annual "tax" of \$1000, and 1½ per cent of the receipts of its business. In 1869 the people of Mississippi ratified a state constitution, one of the provisions of which forbade the authorization of any lottery and annulled the charters of lotteries then in existence. In 1870 the state legislature passed an act prohibiting lotteries within the state. *Quo warranto* filed in 1874 against Stone, the grantee.]

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

It is now too late to contend that any contract which a State actually enters into when granting a charter to a private corporation is not within the protection of the clause in the Constitution of the United States that prohibits States from passing laws impairing the obligation of contracts. . . . The doctrines of *Trustees of Dartmouth College v. Woodward* (4 Wheat. 518), announced by this court more than sixty years ago, have become so imbedded in the jurisprudence of the United States as to make them to all intents and purposes a part of the Constitution itself. In this connection, however, it is to be kept in mind that it is not a charter which is protected, but only any contract the charter may contain. . . . Consequently, the first inquiry in this class of cases always is, whether a contract has in fact been entered into, and if so, what its obligations are. . . .

. . . . There can be no dispute but that . . . the legislature of the

⁶ Mr. Justice Story observes earlier in his arguments: "The moment you ascertain what the terms and stipulations of a grant of a ferry, or any other franchise, are, that moment they are obligatory. They cannot be gainsaid, or resumed. So this court has said in the case of *Fletcher v. Peck*, 6 Cranch, 87. . . . If, then, the ferry between Charlestown and Boston was vested in perpetuity in the corporation of Harvard College, it could not be taken away without its consent by the legislature." He holds that the record proves perpetuity. 11 Pet. 420, 519.

State chartered a lottery company, having all the powers incident to such a corporation. . . . If the legislature that granted this charter had the power to bind the people of the State and all succeeding legislatures to allow the corporation to continue its corporate business during the whole term of its authorized existence, there is no doubt about the sufficiency of the language employed to effect that object. . . . Whether the alleged contract exists, therefore, depends on the authority of the legislature to bind the State and the people of the State in that way.

All agree that the legislature cannot bargain away the police power of a State. . . . Many attempts have been made in this court and elsewhere to define the police power, but never with entire success. It is always easier to determinè whether a particular case comes within the general scope of the power, than to give an abstract definition of the power itself which will be in all respects accurate. No one denies, however, that it extends to all matters affecting the public health or the public morals. . . . Neither can it be denied that lotteries are proper subjects for the exercise of this power. . . . There is now scarcely a State in the Union where lotteries are tolerated. . . .

The question is therefore directly presented, whether, in view of these facts, the legislature of a State can, by the charter of a lottery company, defeat the will of the people, authoritatively expressed, in relation to the further continuance of such business in their midst. We think it cannot. No legislature can bargain away the public health or the public morals. The people themselves cannot do it, much less their servants. The supervision of both these subjects of governmental power is continuing in its nature, and they are to be dealt with as the special exigencies of the moment may require. Government is organized with a view to their preservation, and cannot divest itself of the power to provide for them. For this purpose the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself. . . .

In *Trustees of Dartmouth College v. Woodward* (4 Wheat. 518), it was argued that the contract clause of the Constitution, if given the effect contended for in respect to corporate franchises, "would be an unprofitable and vexatious interference with the internal concerns of a State, would unnecessarily and unwisely embarrass its legislation, and render immutable those civil institutions which are established for the purpose of internal government, and which, to subserve those purposes, ought to vary with varying circumstances." (p. 628); but Mr. Chief Justice Marshall, when he announced the opinion of the court, was careful to say (p. 629), "that the framers of the Constitution did not intend to restrain States in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given

us is not to be so construed." The present case, we think, comes within this limitation. . . .

The contracts which the Constitution protects are those that relate to property rights, not governmental. It is not always easy to tell on which side of the line which separates governmental from property rights a particular case is to be put; but in respect to lotteries there can be no difficulty. . . . Certainly the right to suppress them is governmental, to be exercised at all times by those in power, at their discretion. Any one, therefore, who accepts a lottery charter does so with the implied understanding that the people, in their sovereign capacity, and through their properly constituted agencies, may resume it at any time when the public good shall require, whether it be paid for or not. All that one can get by such a charter is a suspension of certain governmental rights in his favor, subject to withdrawal at will. He has in legal effect nothing more than a license to enjoy the privilege on the terms named for the specified time, unless it be sooner abrogated by the sovereign power of the State. It is a permit, good as against existing laws, but subject to future legislative and constitutional control or withdrawal. . . .

The Impairment of Obligation by State Legislation

OGDEN *v.* SAUNDERS

Supreme Court of the United States. 1827.

12 Wheaton 213.

[Jordan drew several bills of exchange, dated September 30, 1806, upon Ogden in favor of Saunders. Jordan and Saunders were citizens of Kentucky. Ogden was a citizen of New York. The bills were accepted by Ogden at New York, but were not paid when they came to maturity. Saunders instituted suit against Ogden upon the bills of exchange in the United States district court for Louisiana. Ogden pleaded in defense an act of the legislature of the State of New York for the relief of insolvent debtors, dated April 3, 1801.]

WASHINGTON, J. The first and most important point to be decided in this cause, turns essentially upon the question, whether the obligation of a contract is impaired by a State bankrupt or insolvent law, which discharges the person and the future acquisitions of the debtor from his liability under a contract entered into in that State after the passage of the act. . . .

. . . . The case now to be decided, is that of a debt contracted in the State of New York, by a citizen of that State, from which he was discharged, so far as he constitutionally could be, under a bankrupt law of that State, in force at the time when the debt was contracted. . . .

It has constantly appeared to me, throughout the different investigations of this question to which it has been my duty to attend, that the error of those who controvert the constitutionality of the bankrupt law under consideration, in its application to this case, has arisen from not distinguishing accurately between a law which impairs a contract, and one which impairs its obligation. A contract is defined by all to be an agreement to do or not to do some particular act; and in the construction of this agreement, depending essentially upon the will of the parties between whom it is formed, we seek for their intention with a view to fulfil it. Any law, then, which enlarges, abridges, or in any manner changes this intention necessarily impairs the contract itself, which is but the evidence of that intention. . . .

This leads us to a critical examination of the particular phraseology of that part of the [constitution] which relates to contracts. It is a law which impairs the obligation of contracts, and not the contracts themselves, which is interdicted. It is not to be doubted that this term obligation, when applied to contracts, was well considered and weighed by those who framed the constitution, and was intended to convey a different meaning from what the prohibition would have imported without it. . . .

What is it, then, which constitutes the obligation of a contract? The answer is given by the chief justice, in the case of *Sturges v. Crowninshield*, to which I readily assent now, as I did then; it is the law which binds the parties to perform their agreement. The law, then, which has this binding obligation, must govern and control the contract in every shape in which it is intended to bear upon it, whether it affect its validity, construction, or discharge. . . .

It is, then, the municipal law of the State which is emphatically the law of the contract made within the State, and must govern it throughout, wherever its performance is sought to be enforced. . . .

If, then, it be true that the law of the country where the contract is made or to be executed, forms a part of that contract and of its obligation, it would seem to be somewhat of a solecism to say that it does, at the same time, impair that obligation. . . .

It is thus most apparent that, whichever way we turn, whether to laws affecting the validity, construction, or discharges of contracts, or the evidence or remedy to be employed in enforcing them, we are met by this overruling and admitted distinction, between those which operate retrospectively, and those which operate prospectively. In all of them the law is pronounced void in the first class of cases, and not so in the second. . . .

[Marshall, C.J., Story and Duvall, JJ., dissented.]

BLOCK *v.* HIRSH.Supreme Court of the United States. 1921.
256 U.S. 135.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a proceeding brought by the defendant in error, Hirsch, to recover possession of the cellar and first floor of a building on F Street in Washington which the plaintiff in error, Block, holds over after the expiration of a lease to him. Hirsh bought the building while the lease was running, and on December 15, 1919, notified Block that he should require possession on December 31, when the lease expired. Block declined to surrender the premises, relying upon the Act of October 22, 1919 especially # 109, 41 Stat. 297, 298, 301. . . .

By # 109 of the Act the right of a tenant to occupy any hotel, apartment, or "rental property," is to continue notwithstanding the expiration of his term, at the option of the tenant so long as he pays the rent and performs the conditions as fixed by the lease. . . . The statute embodies a scheme or code which it is needless to set forth, but it should be stated that it ends with the declaration in # 122 that the provisions of Title II are made necessary by emergencies growing out of the war, resulting in rental conditions in the District dangerous to the public health and burdensome to public officers, employees and accessories, and thereby embarrassing the Federal Government in the transaction of the public business. As emergency legislation the Title is to end in two years unless sooner repealed.

No doubt it is true that a legislative declaration of facts that are material only as the ground for enacting a rule of law, for instance, that a certain use is a public one, may not be held conclusive by the Courts. . . . But a declaration by a legislature concerning public conditions that by necessity and duty it must know, is entitled at least to great respect. In this instance Congress stated a publicly notorious and almost world-wide fact. That the emergency declared by the statute did exist must be assumed, and the question is whether Congress was incompetent to meet it in the way in which it has been met by most of the civilized countries of the world.

The general proposition to be maintained is that circumstances have clothed the letting of buildings in the District of Columbia with a public interest so great as to justify regulation by law. . . .

The fact that tangible property is also visible tends to give a rigidity to our conception of our rights in it that we do not attach to others less

concretely clothed. But the notion that the former are exempt from the legislative modification required from time to time in civilized life is contradicted not only by the doctrine of eminent domain, under which what is taken is paid for, but by that of the police power in its proper sense, under which property rights may be cut down, and to that extent taken, without pay. Under the police power the right to erect buildings in a certain quarter of a city may be limited to from eighty to one hundred feet. *Welch v. Swasey*, 214 U.S. 91. Safe pillars may be required in coal mines. *Plymouth Coal Co. v. Pennsylvania*, 232 U.S. 531. Billboards in cities may be regulated. *St. Louis Poster Advertising Co. v. St. Louis*, 249 U.S. 269. Watersheds in the country may be kept clear. *Perley v. North Carolina*, 249 U.S. 510. These cases are enough to establish that a public exigency will justify the legislature in restricting property rights in land to a certain extent without compensation. But if to answer one need the legislature may limit height to answer another it may limit rent. We do not perceive any reason for denying the justification held in the foregoing cases to a law limiting the property rights now in question if the public exigency requires that. The reasons are of a different nature but they are certainly not less pressing. Congress has stated the unquestionable embarrassment of Government and danger to the public health in the existing condition of things. The space in Washington is necessarily monopolized in comparatively few hands, and letting portions of it is as much a business as any other. Housing is a necessary of life. All the elements of a public interest justifying some degree of public control are present. The only matter that seems to us open to debate is whether the statute goes too far. For just as there comes a point at which the police power ceases and leaves only that of eminent domain, it may be conceded that regulations of the present sort passed to a certain height might amount to a taking without due process of law. . . .

. . . . The main point against the law is that tenants are allowed to remain in possession at the same rent that they have been paying, unless modified by the Commission established by the Act, and that thus the use of the land and the right of the owner to do what he will with his own and to make what contracts he pleases are cut down. But if the public interest be established the regulation of rates is one of the first forms in which it is asserted, and the validity of such regulation has been settled since *Munn v. Illinois*, 94 U.S. 113. . . . A limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change. . . .

MR. JUSTICE MCKENNA, with whom concurred THE CHIEF JUSTICE, MR. JUSTICE VAN DEVANTER, and MR. JUSTICE McREYNOLDS, dissenting:

. . . . The grounds of dissent are the explicit provisions of the Constitution of the United States; the specifications of the grounds are the irresistible deductions from those provisions and, we think, would require no expression but for the opposition of those whose judgments challenge attention.

The National Government by the Fifth Amendment to the Constitution, and the States by the Fourteenth Amendment, are forbidden to deprive any person of "life, liberty, or property, without due process of law." A further provision of the Fifth Amendment is that private property cannot be taken for public use, without just compensation. And there is a special security to contracts in # 10 of Article I in the provision that "No State shall . . . pass any . . . law impairing the obligation of contracts. . . ." These provisions are limitations upon the national legislation, with which this case is concerned, and limitations upon state legislation. . . .

As already declared, the provisions of the Constitution seem so direct and definite as to need no reinforcing words and to leave no other inquiry than, Does the statute under review come within their provision? It is asserted, that the statute has been made necessary by the conditions resulting from the "Imperial German war." The thought instantly comes that the country has had other wars with resulting embarrassments, yet they did not induce the relaxation of constitutional requirements nor the exercise of arbitrary power. Constitutional restraints were increased, not diminished. However, it may be admitted that the conditions presented a problem and induced an appeal for governmental remedy. But we must bear in mind that the Constitution is, as we have shown, a restraint upon government, purposely provided and declared upon consideration of all the consequences of what it prohibits and permits, making the restraints upon government the rights of the governed. And this careful adjustment of power and rights makes the Constitution what it was intended to be and is, a real charter of liberty, receiving and deserving the praise that has been given it as "the most wonderful work ever struck off at any given time by the brain and purpose of man."

The facts of this litigation point the warning. Recurring to them we may ask, Of what concern is it to the public health or the operations of the Federal Government who shall occupy a cellar, and a room above it, for business purposes in the City of Washington?—(the question in this case); The answer is, to supply homes to the homeless. It does not satisfy. If the statute keeps a tenant in, it keeps a tenant out, indeed, this is its assumption. Its only basis is, that tenants are more numerous than landlords and that in some way this disproportion, it is assumed, makes a tyranny in the landlord, and an oppression to the tenant, notwithstanding the tenant is only required to perform a contract entered into, not

under the statute, by rent fixing—value adjustment—by the power of the Government. And this, it is the view of the opinion, has justification because “space in Washington is limited” and “housing is a necessary of life.” A causative and remedial relation in the circumstances we are unable to see. We do see that the effect and evil of the statute is that it withdraws the dominion of property from its owner, superseding the contracts that he confidently made under the law then existing and subjecting them to the fiat of a subsequent law.

If such exercise of government be legal, what exercise of government is illegal? Houses are a necessary of life, but other things are as necessary. May they too be taken from the direction of their owners and disposed of by the Government? Who supplies them, and upon what inducement? And, when supplied, may those who get them under promise of return, and who had no hand or expense in their supply, dictate the terms of retention or use, and be bound by no agreement concerning them?

An affirmative answer seems to be the requirement of the decision. If the public interest may be concerned, as in the statute under review, with the control of any form of property, it can be concerned with the control of all forms of property. And, certainly, in the first instance, the necessity or expediency of control must be a matter of legislative judgment. But, however, not to go beyond the case—if the public interest can extend a lease it can compel a lease; the difference is only in degree and boldness. In one as much as in the other, there is a violation of the positive and absolute right of the owner of the property. . . . The efficacy of either to afford homes for the homeless cannot be disputed. In response to an inquiry from the bench, counsel replied that the experiment had been tried or was being tried in a European country. It is to be remembered, that the legality of power must be estimated not by what it will do but by what it can do.

The prospect expands and dismays when we pass outside of considerations applicable to the local and narrow conditions in the District of Columbia. . . . The facts are significant and suggest the inquiry, Have conditions come, not only to the District of Columbia, embarrassing the Federal Government, but to the world as well, that are not amenable to passing palliatives, so that socialism, or some form of socialism, is the only permanent corrective or accommodation? It is indeed strange that this court, in effect, is called upon to make way for it and, through the instrument of a constitution based upon personal rights and the purposeful encouragement of individual incentive and energy, to declare legal a power exerted for their destruction.

There can be no conception of property aside from its control and use, and upon its use depends its value. . . . Protection to it has been

regarded as a vital principle of republican institutions. It is next in degree to the protection of personal liberty and freedom from undue interference or molestation. . . .

There is not a contention made in this case that this court has not pronounced untenable. . . .

The wonder comes to us, What will the country do with its new freedom? Contracts and the obligation of contracts are the basis of its life and of all its business, and the Constitution, fortifying the conventions of honor, is their conserving power. . . . Burdens of government are of the highest public interest, and their discharge is of imperious necessity. Therefore, the provocation or temptation may come to those who feel them that the property of others . . . should not have asylum from a share of the load. And what answer can be made to such demand within the principle of the case now decided? Their promises are as much within the principle as the lease of Hirsch is, for, necessarily, if one contract can be disregarded in the public interest every contract can be; patriotic honor may be involved in one more than in another, but degrees of honor may not be attended to—the public interest being regarded as paramount. . . . And it is well to remember that other exigencies may come to the Government making necessary other appeals. The Government can only offer the inducement and security of its bonds, but who will take them if doubt can be thrown upon the integrity of their promises under the conception of a public interest that is superior to the Constitution of the United States? . . .

HOME BUILDING & LOAN ASSOCIATION *v.* BLAISDELL.

Supreme Court of the United States. 1934.
290 U.S. 398.

MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court.

Appellant contests the validity of Chapter 339 of the Laws of Minnesota of 1933, p. 514 . . . called the Minnesota Mortgage Moratorium Law, as being repugnant to the contract clause (Art. I, # 10) and the due process and equal protection clauses of the Fourteenth Amendment, of the Federal Constitution. . . .

The Act provides that, during the emergency declared to exist, relief may be had through authorized judicial proceedings with respect to foreclosures of mortgages, and execution sales, of real estate; that sales may be postponed and periods of redemption may be extended. . . .

Invoking the relevant provision of the statute, appellees applied to the District Court of Hennepin County for an order extending the period of redemption from a foreclosure sale. Their petition stated that they owned a lot in Minneapolis which they had mortgaged to appellant; and that by reason of their default the mortgage had been foreclosed and sold to appellant. . . . ; that appellant was the holder of the sheriff's certificate of sale; that because of the economic depression appellees had been unable to obtain a new loan or to redeem, and that unless the period of redemption were extended the property would be irretrievably lost. . . .

In determining whether the provision for this temporary and conditional relief exceeds the power of the State by reason of the clause in the Federal Constitution prohibiting impairment of the obligations of contracts, we must consider the relation of emergency to constitutional power, the historical setting of the contract clause, the development of the jurisprudence of this Court in the construction of that clause, and the principles of construction which we may consider to be established.

Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved. The Constitution was adopted in a period of grave emergency. Its grants of power to the Federal Government and its limitations of the power of the States were determined in the light of emergency and they are not altered by emergency. What power was thus granted and what limitations were thus imposed are questions which have always been, and always will be, the subject of close examination under our constitutional system.

While emergency does not create power, emergency may furnish the occasion for the exercise of power. The constitutional question presented in the light of an emergency is whether the power possessed embraces the particular exercise of it in response to particular conditions.

. When the provisions of the Constitution, in grant or restriction, are specific, so particularized as not to admit of construction, no question is presented. But where constitutional grants and limitations of power are set forth in general clauses, which afford a broad outline, the process of construction is essential to fill in the details. That is true of the contract clause. The necessity of construction is not obviated by the fact that the contract clause is associated in the same section with other and more specific prohibitions. . . .

The inescapable problems of construction have been: What is a contract? What are the obligations of contracts? What constitutes impairment of these obligations? What residuum of power is there still in the States in relation to the operation of contracts, to protect the vital interests of the community?

The obligation of a contract is "the law which binds the parties to perform their agreement." *Sturges v. Crowninshield*, 4 Wheat. 122, 197. . . . This Court has said that "the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This principle embraces alike those which affect its validity, construction, discharge and enforcement. . . . The ideas of validity and remedy are inseparable, and both are parts of the obligation, which is guaranteed by the Constitution against invasion." *Von Hoffman v. City of Quincy*, 4 Wall. 535, 550, 552. . . .

The obligations of a contract are impaired by a law which renders them invalid, or releases or extinguishes them . . . and impairment . . . has been predicated of laws which without destroying contracts derogate from substantial contractual rights. . . .

The economic interests of the State may justify the exercise of its continuing and dominant protective power notwithstanding interference with contracts. . . . "This power, which in its various ramifications is known as the police power, is an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts between individuals." [*Manigault v. Springs*, 199 U.S. 473, 480.]

The argument is pressed that in the cases we have cited the obligation of contracts was affected only incidentally. This argument proceeds upon a misconception. The question is not whether the legislative action affects contracts incidentally, or directly or indirectly, but whether the legislation is addressed to a legitimate end and the measures taken are reasonable and appropriate to that end. Another argument, which comes more closely to the point, is that the state power may be addressed directly to the prevention of the enforcement of contracts only when these are of a sort which the legislature in its discretion may denounce as being in themselves hostile to public morals, or public health, safety or welfare, or where the prohibition is merely of injurious practices; that interference with the enforcement of other and valid contracts according to appropriate legal procedure, although the interference is temporary and for a public purpose, is not permissible. This is but to contend that in the latter case the end is not legitimate in the view that it cannot be reconciled with a fair interpretation of the constitutional provision.

Undoubtedly, whatever is reserved of state power must be consistent with the fair intent of the constitutional limitation of that power. The reserved power cannot be construed so as to destroy the limitation, nor is the limitation to be construed to destroy the reserved power in its

essential aspects. They must be construed in harmony with each other. The principle precludes a construction which would permit the State to adopt as its policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them. But it does not follow that conditions may not arise in which a temporary restraint of enforcement may be consistent with the spirit and purpose of the constitutional provision and thus be found to be within the range of the reserved power of the State to protect the vital interests of the community. It cannot be maintained that the constitutional provision should be so construed as to prevent limited and temporary interpositions with respect to the enforcement of contracts if made necessary by a great public calamity such as fire, flood, or earthquake. . . . The reservation of state power appropriate to such extraordinary conditions may be deemed to be as much a part of all contracts, as is the reservation of state power to protect the public interest in the other situations to which we have referred. And if state power exists to give temporary relief from the enforcement of contracts in the presence of disasters due to physical causes such as fire, flood or earthquake, that power cannot be said to be non-existent when the urgent public need demanding such relief is produced by other and economic causes. . . .

It is manifest . . . that there has been a growing appreciation of public needs and of the necessity of finding ground for a rational compromise between individual rights and public welfare. The settlement and consequent contraction of the public domain, the pressure of a constantly increasing density of population, the interrelation of the activities of our people and the complexity of our economic interests, have inevitably led to an increased use of the organization of society in order to protect the very bases of individual opportunity. Where, in earlier days, it was thought that only the concerns of individuals or of classes were involved, and that those of the State itself were touched only remotely, it has later been found that the fundamental interests of the State are directly affected; and that the question is no longer merely that of one party to a contract as against another, but of the use of reasonable means to safeguard the economic structure upon which the good of all depends.

It is no answer to say that this public need was not apprehended a century ago, or to insist that what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time. . . . "The case before us must be considered in the light of our whole experience". . . . [*Missouri v. Holland*, 252 U.S. 416, 433.]

Nor is it helpful to attempt to draw a fine distinction between the intended meaning of the words of the Constitution and their intended application. When we consider the contract clause and the decisions which have expounded it in harmony with the essential reserved power

of the States to protect the security of their peoples, we find no warrant for the conclusion that the clause has been warped by these decisions from its proper significance or that the founders of our Government would have interpreted the clause differently had they had occasion to assume that responsibility in the conditions of the later day. The vast body of law which has been developed was unknown to the fathers, but it is believed to have preserved the essential content and the spirit of the Constitution. With a growing recognition of public needs and the relation of individual right to public security, the court (*sic*) has sought to prevent the perversion of the clause through its use as an instrument to throttle the capacity of the States to protect their fundamental interests. This development is a growth from the seeds which the fathers planted. It is a development forecast by the prophetic words of Justice Johnson in *Ogden v. Saunders*, [12 Wheat. 213, 286,] already quoted.⁷ And the germs of the later decisions are found in the early cases of the *Charles River Bridge* and the *West River Bridge*, *supra*, [11 Pet. 420; 6 How. 507,] which upheld the public right against strong insistence upon the contract clause. The principle of this development is, as we have seen, that the reservation of the reasonable exercise of the protective power of the State is read into all contracts. . . .

Applying the criteria established by our decisions we conclude:

1. An emergency existed in Minnesota which furnished a proper occasion for the exercise of the reserved power of the State to protect the vital interests of the community. . . .

2. The legislation was addressed to a legitimate end, that is, the legislation was not for the mere advantage of particular individuals but for the protection of a basic interest of society.

3. In view of the nature of the contracts in question—mortgages of unquestionable validity—the relief afforded and justified by the emergency, in order not to contravene the constitutional provision, could only be of a character appropriate to that emergency and could be granted only upon reasonable conditions.

4. The conditions upon which the period of redemption is extended do not appear to be unreasonable. . . .

5. The legislation is temporary in operation. It is limited to the exigency which called it forth. . . .

MR. JUSTICE SUTHERLAND, dissenting.

⁷ "But to assign to contracts, universally, a literal purport, and to exact for them a rigid literal fulfillment, could not have been the intent of the constitution. It is repelled by a hundred examples. Societies exercise a positive control as well over the inception, construction, and fulfillment of contracts, as over the form and measure of the remedy to enforce them."—Ed.

Few questions of greater moment. . . . He simply closes his eyes And those of us who are apprehensive of the effect of this decision. . . .

A provision of the Constitution, it is hardly necessary to say, does not admit of two distinctly opposite interpretations. . . . If the contract impairment clause, when framed and adopted, meant that the terms of a contract for the payment of money could not be altered *in invitum* by a state statute enacted for the relief of hardly pressed debtors to the end and with the effect of postponing payment or enforcement during and because of an economic or financial emergency, it is but to state the obvious to say that it means the same now. . . .

The provisions of the Federal Constitution, undoubtedly, are pliable in the sense that in appropriate cases they have the capacity of bringing within their grasp every new condition which falls within their meaning. But, their meaning is changeless; it is only their application which is extensible. . . .

The whole aim of construction, as applied to a provision of the Constitution, is to discover the meaning, to ascertain and give effect to the intent, of its framers and the people who adopted it. . . . The necessities which gave rise to the provision, the controversies which preceded, as well as the conflicts of opinion which were settled by its adoption, are matters to be considered to enable us to arrive at a correct result. . . .

An application of these principles to the question under review removes any doubt, if otherwise there would be any, that the contract impairment clause denies to the several states the power to mitigate hard consequences resulting to debtors from financial or economic exigencies by an impairment of the obligation of contracts of indebtedness. A candid consideration of the history and circumstances which led up to and accompanied the framing and adoption of this clause will demonstrate conclusively that it was framed and adopted with the specific and studied purpose of preventing legislation designed to relieve debtors *especially* in time of financial distress. . . .

* * * * *

The present exigency is nothing new. From the beginning of our existence as a nation, periods of depression, of industrial failure, of financial distress, of unpaid and unpayable indebtedness, have alternated with years of plenty and the attempt by legislative devices to shift the misfortune of the debtor to the shoulders of the creditor without coming into conflict with the contract impairment clause has been persistent and oft-repeated.

The defense of the Minnesota law is made upon grounds which were discountenanced by the makers of the Constitution and have many times been rejected by this court. That defense should not now succeed, be-

cause it constitutes an effort to overthrow the constitutional provision by an appeal to facts and circumstances identical with those which brought it into existence. With due regard for the processes of logical thinking, it legitimately cannot be urged that conditions which produced the rule may now be invoked to destroy it. . . .

The Minnesota statute either impairs the obligation of contracts or it does not. If it does not, the occasion to which it relates becomes immaterial, since then the passage of the statute is the exercise of a normal, unrestricted, state power and requires no special occasion to render it effective. If it does, the emergency no more furnishes a proper occasion for its exercise than if the emergency were non-existent. . . .

If what has now been said is sound, as I think it is, we come to what is really the vital question in the case: Does the Minnesota statute constitute an impairment of the obligation of the contract now under review?

It is quite true also that "the reservation of essential attributes of sovereign power is also read into contracts"; and that the legislature cannot "bargain away the public health or the public morals." General statutes to put an end to lotteries, the sale or manufacture of intoxicating liquors, the maintenance of nuisances, to protect the public safety, etc., although they have the indirect effect of absolutely destroying private contracts previously made in contemplation of a continuance of the state of affairs then in existence but subsequently prohibited, have been uniformly upheld as not violating the contract impairment clause. The distinction between legislation of that character and the Minnesota statute, however, is readily observable. . . . The contract immediately falls because its performance has ceased to be lawful. This is so because the contract is made upon the implied condition that a particular state of things shall continue to exist, "and when that state of things ceases to exist the bargain itself ceases to exist." *Marshall v. Glanvill*, (1917) 2 K. B. 87, 91. . . .

The rent cases—*Block v. Hirsh*, 256 U.S. 135 —which are here relied upon, dealt with an exigent situation due to a period of scarcity of housing caused by war. . . . The writer of the opinions . . . speaking for this court in a later case, *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416, characterized all of them as having gone "to the verge of the law" Reasonably considered they do not foreclose the question here involved, and it should be determined upon its merits without regard to those cases.

We come back, then, directly to the question of impairment. As to that, the conclusion reached by the court here seems to be that the relief afforded by the statute does not contravene the constitutional provision

because it is of a character appropriate to the emergency and allowed upon what are said to be reasonable conditions. . . .

A statute which materially delays enforcement of the mortgagee's contractual right of ownership and possession does not modify the remedy merely; it destroys, for the period of delay, *all* remedy so far as the enforcement of that right is concerned. The phrase, "obligation of a contract," in the constitutional sense imports a legal duty to perform the specified obligation of *that* contract, not to substitute and perform, against the will of one of the parties, a different, albeit equally valuable, obligation. And a state, under the contract impairment clause, has no more power to accomplish such a substitution than has one of the parties to the contract against the will of the other. . . . "Any authorization of the postponement of payment, or of means by which such postponement may be effected, is in conflict with the constitutional inhibition." *Louisiana v. New Orleans*, 102 U.S. 203, 207. . . .

I quite agree with the opinion of the court that whether the legislation under review is wise or unwise is a matter with which we have nothing to do. Whether it is likely to work well or work ill presents a question entirely irrelevant to the issue. The only legitimate inquiry we can make is whether it is constitutional. If it is not, its virtues, if it have any, cannot save it; if it is, its faults cannot be invoked to accomplish its destruction. If the provisions of the Constitution be not upheld when they pinch as well as when they comfort, they may as well be abandoned. Being unable to reach any other conclusion than that the Minnesota statute infringes the constitutional restriction under review, I have no choice but to say so.

I am authorized to say that MR. JUSTICE VAN DEVANTER, MR. JUSTICE McREYNOLDS and MR. JUSTICE BUTLER concur in this opinion.

W. B. WORTHEN CO. *v.* KAVANAUGH.

Supreme Court of the United States. 1935.
295 U.S. 56.

MR. JUSTICE CARDOZO delivered the opinion of the Court.

Municipal Improvement Districts organized under the laws of Arkansas are empowered to issue bonds and to mortgage benefit assessments as security therefor. Street Improvement District, No. 513, of Little Rock, Arkansas, acted under the power thus conferred. On July 1, 1930, it issued bonds, payable to bearer, in the amount of \$31,000, and made a

mortgage to a firm of bankers as trustee for the bondholders. . . . Some of the bonds were in default on January 1, 1934, for non-payment of principal and interest. This suit was brought by the trustee and also by representatives of the bondholders to foreclose the assessments upon the lots of delinquent owners and for other relief. The right to maintain the suit is undisputed. The controversy hinges upon the terms of the decree.

At the execution of the bonds and mortgages the statutes of Arkansas contained provisions well planned to make these benefit assessments an acceptable security. Under the statutes then in force, lot owners had thirty days for payment of assessments. . . . If payment was not made within that time, the collector was to add a penalty of twenty per cent, and make immediate return of delinquents to the Board of Commissioners. . . . The duty was then imposed upon the Commissioners to bring foreclosure suits at once. . . . If the sum adjudged was not paid within ten days, the property was to be sold upon twenty days notice. . . . The property owner was given time to redeem upon payment of the purchase price. . . . The time for redemption was either two years or five, there being uncertainty in that respect as to the meaning of the statute. In any event, the purchaser was to be let into possession at once upon the approval of the sale, and was not to be accountable for rents upon redemption. . . .

In March, 1933, the legislature of Arkansas passed three acts . . . which made over the whole plan to enforce the payment of assessments. . . . (T)he time for payment after notice was enlarged from thirty days to ninety; the penalty was reduced from twenty per cent to three per cent; the return of the delinquent list, which till then had to be made forthwith, was to be withheld for another ninety days. . . . The decree when rendered was to give still another twelve months for payment (instead of ten days as theretofore) and an additional six months after the new default before the property could be sold. . . . (T)he time of redemption was fixed at four years from the sale, and the rate of interest (formerly 10% or 20%) was reduced to 6%. . . . Finally, . . . there was a repeal of (the provision) under which a purchaser had been given the right to go into possession during the term allowed for redemption. . . . Coupled with the repeal was the declaration of an emergency, which was stated to endanger the peace, health and safety of a multitude of citizens.

. . . . The changes were attacked as an unconstitutional impairment of the obligation of contract. . . . The validity of the new acts was upheld by the Chancery Court, and thereafter on appeal by the Supreme Court of the State. . . .

To know the obligation of a contract we look to the laws in force at its making. *Sturges v. Crowninshield*, 4 Wheat. 122, 197; *Home Build-*

ing & Loan Assn. v. Blaisdell, 290 U.S. 398, 429. In the books there is much talk about distinctions between changes of the substance of the contract and changes of the remedy. . . . The dividing line is at times obscure. There is no need for the purposes of this case to plot it on the legal map. Not even changes of the remedy may be pressed so far as to cut down the security of a mortgage without moderation or reason or in a spirit of oppression. Even when the public welfare is invoked as an excuse, these bounds must be respected. . . . We state the outermost limits only. In stating them we do not exclude the possibility that the bounds are even narrower. The case does not call for definition more precise. A catalogue of the changes imposed upon this mortgage must lead to the conviction that the framers of the amendments have put restraint aside. With studied indifference to the interests of the mortgagee or to his appropriate protection they have taken from the mortgage the quality of an acceptable investment for a rational investor.

Under the statutes in force at the making of the contract, the property owner was spurred by every motive of self-interest to pay his assessments if he could, and to pay them without delay. Under the present statutes he has every incentive to refuse to pay a dollar, either for interest or for principal. The interval between default in payment and a sale in the foreclosure suit was approximately sixty-five days under the practice formerly prevailing. . . . The interval between default and sale under the amendatory acts is at least two and a half years, and may be a good deal more. . . . Under the earlier law the purchaser, who was likely to be the plaintiff mortgagee, could go into possession upon the confirmation of the sale, and keep the rents and profits during the years allowable for redemption. Today this privilege is withdrawn, and for another four years the possession of the delinquent owner is unaffected by the sale. . . . There is no enforceable obligation in the interval to pay instalments of the principal or even the accruing coupons. . . . Relief is not conditioned upon payment of interest and taxes or the rental value of the premises. The case is one of postponement for a term of many years with undisturbed possession for the debtor and without a dollar for the creditor. There is not even a requirement that the debtor shall satisfy the court of his inability to pay.

Whether one or more of the changes effected by these statutes would be reasonable and valid if separated from the others, there is no occasion to consider. . . . A different situation is presented when extensions are so piled up as to make the remedy a shadow. . . . What controls our judgment at such times is the underlying reality rather than the form or label. The changes of remedy now challenged as invalid are to be viewed in combination, with the cumulative significance that each imparts to all. So viewed they are seen to be an oppressive and unnecessary destruc-

tion of nearly all the incidents that give attractiveness and value to collateral security. . . .

Upholders of the challenged acts appeal to the authority of *Home Building & Loan Assn. v. Blaisdell*, *supra*, the case of the Minnesota moratorium. There for a maximum term of two years, but in no event beyond the then existing emergency, a court was empowered, if there was a proper showing of necessity, to stay the foreclosure of a mortgage, but only upon prescribed conditions. "The mortgagor during the extended period is not ousted from possession but he must pay the rental value of the premises as ascertained in judicial proceedings and this amount is applied to the carrying of the property and to interest upon the indebtedness." 290 U.S. at p. 445. None of these restrictions, nor anything approaching them, is present in this case. . . .

The Impairment of Obligation by Federal Legislation

NORMAN V. BALTIMORE & OHIO RAILROAD CO.

Supreme Court of the United States, 1935.

294 U.S. 240.

MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court.

These cases present the question of the validity of the Joint Resolution of the Congress, of June 5, 1933, with respect to the "gold clauses" of private contracts for the payment of money. 48 Stat. 112.

This Resolution . . . declares that "every provision contained in or made with respect to any obligation which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby" is "against public policy." Such provisions in obligations thereafter incurred are prohibited. The Resolution provides that "Every obligation, heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts."

In 270, the suit was brought upon a coupon of a bond made by the Baltimore & Ohio Railroad Company under date of February 1, 1930, for the payment of \$1,000 on February 1, 1960, and interest from date at the rate of 4½ per cent. per annum, payable semi-annually. The bond provided that the payment of principal and interest "will be made . . . in gold coin of the United States of America of or equal to the standard of weight and fineness existing on February 1, 1930." The coupon in

suit, for \$22.50, was payable on February 1, 1934. The complaint alleged that on February 1, 1930, the standard weight and fineness of a gold dollar of the United States "was fixed to consist of twenty-five and eight-tenths grains of gold, nine-tenths fine," pursuant to the Act of Congress of March 14, 1900 and that by the Act of Congress known as the "Gold Reserve Act of 1934" , and by the order of the President under the Act, the standard unit of value of a gold dollar of the United States "was fixed to consist of fifteen and five-twenty-firsts grains of gold, nine-tenths fine," from and after January 31, 1934. On presentation of the coupon, defendant refused to pay the amount in gold, or the equivalent of gold in legal tender of the United States which was alleged to be, on February 1, 1934, according to the standard of weight and fineness existing on February 1, 1930, the sum of \$38.10, and plaintiff demanded judgment for that amount.

Defendant answered that by Acts of Congress, and, in particular, by the Joint Resolution of June 5, 1933, defendant had been prevented from making payment in gold coin "or otherwise than dollar for dollar, in coin or currency of the United States (other than gold coin and gold certificates)" which at the time of payment constituted legal tender. . . . Judgment was entered for plaintiff for \$22.50, the face of the coupon, and was affirmed upon appeal. . . .

The question before the Court is one of power, not of policy. And that question touches the validity of these measures at but a single point, that is, in relation to the Joint Resolution denying effect to "gold clauses" in existing contracts. . . .

First. The decisions of this Court relating to clauses for payment in gold did not deal with situations corresponding to those now presented. . . .

We are of the opinion that the gold clauses now before us were not contracts for payment in gold coin as a commodity, or in bullion, but were contracts for the payment of money. The bonds were severally for the payment of one thousand dollars. We also think that, fairly construed, these clauses were intended to afford a definite standard or measure of value, and thus to protect against a depreciation of the currency and against the discharge of the obligation by a payment of lesser value than that prescribed. . . .

Moreover, there attaches to the ownership of gold and silver those limitations which public policy may require by reason of their quality as legal tender and as a medium of exchange. . . . Their quality as legal tender is attributed by the law, aside from their bullion value. . . .

Dealing with the specific question as to the effect of the legal tender acts upon contracts made before their passage, that is, those for the

payment of money generally, the Court, in the legal tender cases, recognized the possible consequences of such enactments in frustrating the expected performance of contracts,—in rendering them “fruitless or partially fruitless.” The conclusion was that contracts must be understood as having been made in reference to the possible exercise of the rightful authority of the Government, and that no obligation of a contract “can extend to the defeat” of that authority.

On similar grounds, the Court dismissed the contention under the Fifth Amendment forbidding the taking of private property for public use without just compensation or the deprivation of it without due process of law. That provision, said the Court, referred only to a direct appropriation. . . . The harshness of such legislation, or the hardship it may cause, afforded no reason for considering it to be unconstitutional. . . .

The question of the validity of the Joint Resolution of June 5, 1933, must be determined in the light of these settled principles. . . .

Third. Here, the Congress has enacted an express interdiction. . . . And the contestants urge that the Congress is seeking not to regulate the currency, but to regulate contracts, and thus has stepped beyond the power conferred.

This argument is in the teeth of another established principle. Contracts, however express, cannot fetter the constitutional authority of the Congress. Contracts may create rights of property, but when contracts deal with a subject matter which lies within the control of the Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them. . . .

The principle is not limited to the incidental effect of the exercise by the Congress of its constitutional authority. There is no constitutional ground for denying to the Congress the power expressly to prohibit and invalidate contracts although previously made, when they interfere with the carrying out of the policy it is free to adopt. . . .

The same reasoning applies to the constitutional authority of the Congress to regulate the currency and to establish the monetary system of the country. If the gold clauses now before us interfere with the policy of the Congress in the exercise of that authority, they cannot stand. . . .

Despite the wide range of discussion at the bar and the earnestness with which the arguments against the validity of the Joint Resolution have been pressed, these contentions necessarily are brought, under the dominant principles to which we have referred, to a single and narrow point. That point is whether the gold clauses do constitute an actual interference with the monetary policy of the Congress in the light of its broad power to determine that policy. Whether they may be deemed

to be such an interference depends upon an appraisalment of economic conditions and upon determinations of questions of fact. With respect to those conditions and determinations, the Congress is entitled to its own judgment. We may inquire whether its action is arbitrary or capricious, that is, whether it has reasonable relation to a legitimate end. If it is an appropriate means to such an end, the decision of the Congress as to the degree of the necessity for the adoption of that means, is final. . . .

The devaluation of the dollar placed the domestic economy upon a new basis. In the currency as thus provided, States and municipalities must receive their taxes; railroads, their rates and fares; public utilities, their charges for services. The income out of which they must meet their obligations is determined by the new standard. Yet, according to the contentions before us, while that income is thus controlled by law, their indebtedness on their "gold bonds" must be met by an amount of currency determined by the former gold standard. Their receipts, in this view, would be fixed on one basis; their interest charges, and the principal of their obligations, on another. It is common knowledge that the bonds issued by these obligors have generally contained gold clauses, and presumably they account for a large part of the outstanding obligations of that sort. It is also common knowledge that a similar situation exists with respect to numerous industrial corporations that have issued their "gold bonds" and must now receive payments for their products in the existing currency. It requires no acute analysis or profound economic inquiry to disclose the dislocation of the domestic economy which would be caused by such a disparity of conditions in which, it is insisted, those debtors under gold clauses should be required to pay one dollar and sixty-nine cents in currency while respectively receiving their taxes, rates, charges and prices on the basis of one dollar of that currency.

We are not concerned with consequences, in the sense that consequences, however serious, may excuse an invasion of constitutional right. We are concerned with the constitutional power of the Congress over the monetary system of the country and its attempted frustration. Exercising that power, the Congress has undertaken to establish a uniform currency, and partly between kinds of currency, and to make that currency, dollar for dollar, legal tender for the payment of debts. In the light of abundant experience, the Congress was entitled to choose such a uniform monetary system, and to reject a dual system, with respect to all obligations within the range of the exercise of its constitutional authority. . . . We think that it is clearly shown that these clauses interfere with the exertion of the power granted to the Congress. . . .

[McReynolds, J., dissented with the concurrence of Van Devanter, Sutherland, and Butler, JJ.]

CONTINENTAL ILLINOIS NATIONAL BANK & TRUST CO. *v.* CHICAGO,
ROCK ISLAND & PACIFIC RY. CO.Supreme Court of the United States. 1935.
294 U.S. 648.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

On June 7, 1933, the Chicago, Rock Island & Pacific Railway Co. filed a petition seeking a reorganization under # 77 of the Bankruptcy Act, in the federal District Court for the Northern District of Illinois, Eastern Division, alleging that it was "unable to meet its debts as they mature." Nine of the debtor's subsidiaries thereafter joined in the proceedings. . . . On September 26, 1933, the debtor filed a petition for instructions which alleged that it had outstanding collateral notes secured by mortgage bonds . . . that the value of the collateral . . . is substantially in excess of the loan thereby secured; that if holders of the notes should sell the collateral it would cause a substantial and irreparable loss to the trust estate. . . . The petition prayed that the court determine whether it should enjoin the holders of the collateral notes, in the event of a default, from selling any of the collateral. . . .

The Chicago, Rock Island and Pacific system comprises over 8,000 miles of line, extending into more than one-fourth of the states of the Union, and into 20 federal judicial districts. At the commencement of this reorganization proceeding, its capitalization outstanding in the hands of the public was \$459,059,808. . . . If, pending the reorganization, trustees for the bondholders and these noteholders should sell the pledged securities, the capitalization outstanding in the hands of the public would to that extent be expanded; and the aggregate capitalization might thereby become as much as \$659,520,323.

By the Act of March 3, 1933, c. 204, 47 Stat. 1467, original jurisdiction, in addition to that theretofore exercised in voluntary and involuntary proceedings to adjudge persons bankrupt, was conferred upon courts of bankruptcy "in proceedings for the relief of debtors," as provided in ### 74, 75, and 77 of the act. We are here concerned only with # 77. That section contains provisions for the reorganization of railroads engaged in interstate commerce. It permits any railroad corporation which is insolvent or unable to meet its debts as they mature to effect a plan of reorganization. . . .

Before acceptance of any plan, the Interstate Commerce Commission is directed to hold a public hearing, following which it shall render a report recommending a plan. . . . No plan may be finally approved by

the commission until it has been accepted in writing by creditors holding two-thirds in amount of the claims and by stockholders holding two-thirds of the stock. . . .

Upon approval by the commission, the judge, after hearing, shall confirm the plan if satisfied. . . .

On November 22, 1933, after a hearing, the Reconstruction Finance Corporation and the banks were restrained and enjoined from disposing of the collateral until further order of the court. . . .

. . . . The case was brought here on certiorari. . . .

First. The constitutional validity of the section in its general scope and application is not assailed. . . . Nevertheless, grave doubt has been expressed in respect of that question; and since the question is inherently fundamental, we deem it necessary to consider and dispose of it *in limine*. . . .

Article I, # 8, cl. 4 of the Federal Constitution vests Congress with the power "to establish uniform laws on the subject of bankruptcies throughout the United States"; and the simple question is—does # 77 constitute a law on the subject of bankruptcies? While attempts have been made to formulate a distinction between bankruptcy and insolvency, it long has been settled that, within the meaning of the constitutional provision, the terms are convertible. . . . From the beginning, the tendency of legislation and of judicial interpretation has been uniformly in the direction of progressive liberalization in respect of the operation of the bankruptcy power. . . .

But it does not follow that the power has no limitations. Those limitations have never been explicitly defined, and any attempt to do so now would result in little more than a paraphrase of the language of the Constitution without advancing far toward its full meaning. . . . Probably the most satisfactory approach to the problem of interpretation here involved is to examine it in the light of the acts, and the history of the acts, of Congress which have from time to time been passed on the subject; for, like many other provisions of the Constitution, the nature of this power and the extent of it can best be fixed by the gradual process of historical and judicial "inclusion and exclusion."

The first act, that of 1800, so far ignored the English law, which was confined to traders, as to include bankers, brokers and underwriters as well. The act of 1841 added merchants; and other additions have been made by later acts until now practically all classes of persons and corporations are included. . . . The act of 1800 was one exclusively in the interest of the creditor. But the act of 1841 took what then must have been regarded as a radical step forward by conferring upon the debtor the right by voluntary petition to surrender his property, with

some exceptions, and relieve himself of all future liability in respect of past debts. The act of 1800, like the English law, was conceived in the view that the bankrupt was dishonest; while the act of 1841 and the later acts proceeded upon the assumption that he might be honest but unfortunate. . . .

By the act of 1867, as amended by the act of 1874, . . . the debtor for the first time was permitted either before or after an adjudication in bankruptcy, to propose terms of composition to his creditors to become binding upon their acceptance by a designated majority and confirmation by the judge.

The fundamental and radically progressive nature of these extensions becomes apparent upon their mere statement; but all have been judicially approved or accepted as falling within the power conferred by the bankruptcy clause of the Constitution. Taken altogether, they demonstrate in a very striking way the capacity of the bankruptcy clause to meet new conditions as they have been disclosed as a result of the tremendous growth of business and development of human activities from 1800 to the present day. And these acts, far-reaching though they be, have not gone beyond the limit of congressional power; but rather have constituted extensions into a field whose boundaries may not yet be fully revealed.

Section 77 advances another step in the direction of liberalizing the law on the subject of bankruptcies. Railway corporations had been definitely excluded from the operation of the law in 1910 . . . probably because such corporations could not be liquidated in the ordinary way or by a distribution of assets. A railway is a unit; it cannot be divided up and disposed of piecemeal like a stock of goods. It must be sold, if sold at all, as a unit and as a going concern. Its activities can not be halted because its continuous, uninterrupted operation is necessary in the public interest; and, for the preservation of that interest, as well as for the protection of the various private interests involved, reorganization was evidently regarded as the most feasible solution whenever the corporation had become "insolvent or unable to meet its debts as they mature."

Equity receiverships, resorted to for that purpose, have never been satisfactory, for many reasons. Partly, no doubt, in recognition of that situation, Congress, by § 77, added railroad corporations to the category of those who might have relief by legislation passed in virtue of the bankruptcy clause of the Constitution; and determined, after consideration, that such relief to be effectual should take the form of a reorganization, and should extend to cases where the corporation is "unable to meet its debts as they mature." The last phrase, since it is used as an alternative for the word "insolvent," obviously means something less than a

condition of "bankruptcy" or "insolvency" as those words are employed in the law. . . . It may be construed to include a debtor who, although unable to pay promptly, may be able to pay if time to do so be sufficiently extended. Obviously, # 77 does no more than follow the line of historical and progressive development projected by previous acts.

As outlined by that section, a plan of reorganization, when confirmed, cannot be distinguished in principle from the composition with creditors authorized by the act of 1867, as amended by the act of 1874. . . .

Fourth. We find no substance in the contention of the petitioning banks that # 77, as applied by the court below to permit an injunction restraining the sale of the collateral, violates the Fifth Amendment. . . .

The Constitution, as it many times has been pointed out, does not in terms prohibit Congress from impairing the obligation of contracts as it does the states. But as far back as *Calder v. Bull*, 3 Dall. 386, 388, it was said that among other acts which Congress could not pass without exceeding its authority was "a law that destroys or impairs the lawful private contracts of citizens." The broad reach of that statement has been restricted (*Legal Tender Cases*, 12 Wall. 457, 549-550); but the principle which it includes has never been repudiated, although the extent to which it may be carried has not been definitely fixed. Speaking generally, it may be said that Congress, while without power to impair the obligation of contracts by laws acting directly and independently to that end, undeniably, has authority to pass legislation pertinent to any of the powers conferred by the Constitution, however it may operate collaterally or incidentally to impair or destroy the obligation of private contracts. *Legal Tender Cases*, *supra*; *Louisville & Nashville R. Co. v. Mottley*, 219 U. S. 467, 480-482, 484; *Highland v. Russell Car Co.*, 279 U. S. 253, 261. And under the express power to pass uniform laws on the subject of bankruptcies, the legislation is valid though drawn with the direct aim and effect of relieving insolvent persons in whole or in part from the payment of their debts. . . . So much necessarily results from the nature of the power, and this must have been within the contemplation of the framers of the Constitution when the power was granted. . . .

MR. JUSTICE BRANDEIS took no part in the decision of this case.

LOUISVILLE JOINT STOCK LAND BANK v. RADFORD.

Supreme Court of the United States. 1935.

295 U. S. 555.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

This case presents for decision the question whether sub-section (s) added to # 75 of the Bankruptcy Act by the Frazier-Lemke Act, June 28, 1934, c. 869, 48 Stat. 1289, is consistent with the Federal Constitution. . . . (I)t has been sustained elsewhere. In view of the novelty and importance of the question, we granted certiorari.

In 1922 (and in 1924) Radford mortgaged to the Louisville Joint Stock Land Bank a farm in Christian County, Kentucky, comprising 170 acres, then presumably of the appraised value of at least \$18,000. The mortgages were given to secure loans aggregating \$9,000, to be repaid in instalments over the period of 34 years with interest at the rate of 6 per cent. Radford's wife joined in the mortgages and the notes. In 1931 and subsequent years, the Radfords made default in their covenant to pay the taxes. In 1932 and 1933, they made default in their promise to pay the instalments of interest and principal. In 1933, they made default, also, in their covenant to keep the buildings insured. The Bank urged the Radfords to endeavor to refinance the indebtedness pursuant to the provisions of the Emergency Farm Mortgage Act, May 12, 1933, c. 25, 48 Stat. 41. After they had declined to do so, the Bank, having declared the entire indebtedness immediately payable, commenced in June, 1933, a suit in the Circuit Court for Christian County against the Radfords and their tenant to foreclose the mortgages; and, invoking a covenant in the mortgage expressly providing therefor, sought the appointment of a receiver to take possession and control of the premises and to collect the rents and profits.

The application for the appointment of a receiver was denied, and all proceedings in the suit were stayed, upon request of the Conciliation Commissioner for Christian County appointed under # 75 of the Bankruptcy Act, as he stated that Radford desired to avail himself of the provisions of that section. Proceeding under it, Radford filed, in the federal court for western Kentucky, a petition praying that he be afforded an opportunity to effect a composition of his debts. The petition was promptly approved and a meeting of the creditors was held. But Radford failed to obtain the acceptance of the requisite majority in number and amount to the composition proposed. Then, the Bank offered to accept a deed of the mortgaged property in full satisfaction

of the indebtedness to it and to assume the unpaid taxes. Radford refused to execute the deed; and on June 30, 1934, the state court entered judgment ordering a foreclosure sale.

Meanwhile, the Frazier-Lemke Act had been passed on June 28, 1934; and on August 6, 1934, and again on November 10, 1934, Radford filed amended petitions for relief thereunder. The second amended petition prayed that Radford be adjudged a bankrupt and that he have the relief provided for in Paragraphs 3 and 7 of sub-section (s) of the Frazier-Lemke Amendment. That Act provides, among other things, that a farmer who had failed to obtain the consents requisite to a composition under # 75 of the Bankruptcy Act, may, upon being adjudged a bankrupt, acquire alternative options in respect to mortgaged property:

1. By Paragraph 3, the bankrupt may, if the mortgagee assents, purchase the property at its then appraised value by agreeing to make deferred payments. . . .

2. By Paragraph 7, the bankrupt may, if the mortgagee refuses his assent to the immediate purchase on the above basis, require the bankruptcy court to "stay all proceedings for a period of five years, during which five years the debtor shall retain full possession of all or any part of his property, under the control of the court, provided he pays a reasonable rental annually, such rental to be distributed among the secured and unsecured creditors *Provided, however,* That the provisions of this Act shall apply only to debts existing at the time this Act becomes effective."

Answering the amended petition, the Bank duly claimed that the Frazier-Lemke Act is, and the relief sought would be, unconstitutional. The federal court overruled the Bank's objections; adjudged Radford a bankrupt within the meaning of the Frazier-Lemke Act; and appointed a referee to take proceedings thereunder. . . .

The referee ordered an appraisal of all of Radford's property. The appraisers found that the "market value of said land" was then \$4,445. The referee approved the appraisal, although the Bank offered in open court to pay \$9,205.09 in cash for the mortgaged property. . . .

The Bank refused to consent to a sale of the mortgaged property to Radford at the appraised value. Thereupon, the referee ordered that, for the period of five years, all proceedings for the enforcement of the mortgage be stayed. All the orders of the referee were duly approved by the District Court; and its decree was affirmed by the Circuit Court of Appeals. . . .

Since entry of the judgment of the Court of Appeals, this Court has held unconstitutional provisions of state legislation in some respects com-

parable to the Frazier-Lemke Act. *W. B. Worthen Co. v. Kavanaugh*, ante, p. 56. . . .

First. For centuries efforts to protect necessitous mortgagors have been persistent. Gradually the mortgage of real estate was transformed from a conveyance upon condition into a lien; and failure of the mortgagor to pay on the day fixed ceased to effect an automatic foreclosure. Courts of equity, applying their established jurisdiction to relieve against penalties and forfeitures, created the equity of redemption. Thus the mortgagor was given a reasonable time to cure the default and to require a reconveyance of the property. Legislation in many states carried this development further, and preserved the mortgagor's right to possession, even after default, until the conclusion of foreclosure proceedings. But the statutory command that the mortgagor should not lose his property on default had always rested on the assumption that the mortgagee would be compensated for the default by a later payment, with interest, of the debt for which the security was given; and the protection afforded the mortgagor was, in effect, the granting of a stay. No instance has been found, except under the Frazier-Lemke Act, of either a statute or decision compelling the mortgagee to relinquish the property to the mortgagor free of the lien unless the debt was paid in full.

This right of the mortgagee to insist upon full payment before giving up his security has been deemed of the essence of a mortgage. . . . To protect his right to full payment or the mortgaged property, the mortgagee was allowed to bid at the judicial sale on foreclosure. In many states other statutory changes were made in the form and detail of foreclosure and redemption. But practically always the measures adopted for the mortgagor's relief, including moratorium legislation enacted by the several states during the present depression, resulted primarily in a stay; and the relief afforded rested, as theretofore, upon the assumption that no substantive right of the mortgagee was being impaired, since payment in full of the debt with interest would fully compensate him.

Statutes for the relief of mortgagors, when applied to preëxisting mortgages, have given rise, from time to time, to serious constitutional questions. The statutes were sustained by this Court when, as in *Home Building & Loan Assn. v. Blaisdell*, 290 U. S. 398, they were found to preserve substantially the right of the mortgagee to obtain, through application of the security, payment of the indebtedness. They were stricken down, as in *W. B. Worthen Co. v. Kavanaugh*, ante, p. 56, when it appeared that this substantive right was substantially abridged. . . .

Second. Although each of our national bankruptcy acts followed a major or minor depression, none had, prior to the Frazier-Lemke amendment, sought to compel the holder of a mortgage to surrender to the

bankrupt either the possession of the mortgaged property or the title, so long as any part of the debt thereby secured remained unpaid. . . .

No bankruptcy act had undertaken to modify in the interest of either the debtor or other creditors any substantive right of the holder of a mortgage valid under federal law.

Bankruptcy acts had authorized the court to direct that the property be sold free of encumbrances. . . . But there had been no suggestion that such a sale could be made to the prejudice of the lienor, in the interest of either the debtor or of other creditors. . . . No court appears ever to have authorized a sale at a price less than that which the lien creditor offered to pay for the property in cash. . . .

Third. . . . It is true that the original purpose of our bankruptcy acts was the equal distribution of the debtor's property among his creditors. . . . But, the scope of the bankruptcy power conferred upon Congress is not necessarily limited to that which has been exercised. . . . The discharge of the debtor has come to be an object of no less concern than the distribution of his property. . . .

It is true that the position of a secured creditor, who has rights in specific property, differs fundamentally from that of an unsecured creditor, who has none. . . . But we have no occasion to decide in this case whether the bankruptcy clause confers upon Congress generally the power to abridge the mortgagee's rights in specific property. Because the Act is retroactive in terms and as here applied purports to take away rights of the mortgagee in specific property, another provision of the Constitution is controlling.

Fourth. The bankruptcy power, like the other great substantive powers of Congress, is subject to the Fifth Amendment. Under the bankruptcy power Congress may discharge the debtor's personal obligation, because, unlike the States, it is not prohibited from impairing the obligation of contracts. . . . But the effect of the Act here complained of is not the discharge of Radford's personal obligation. It is the taking of substantive rights in specific property acquired by the Bank prior to the Act. In order to determine whether rights of that nature have been taken, we must ascertain what the mortgagee's rights were before the passage of the Act. We turn, therefore, first to the law of the State. . . .

Fifth. The controlling purpose of the Act is to preserve to the mortgagor the ownership and enjoyment of the farm property. . . . As here applied it has taken from the Bank the following property rights recognized by the Law of Kentucky:

1. The right to retain the lien until the indebtedness thereby secured is paid.
2. The right to realize upon the security by a judicial public sale.
3. . . .

4.
 5. The right to control meanwhile the property during the period of default. . . .

Sixth. . . .

Seventh. . . . We have no occasion to consider either the causes or the extent of farm tenancy; or whether its progressive increase would be arrested by the provisions of the Act. Nor need we consider the occupation of the beneficiaries of the legislation. These are matters for the consideration of Congress; and the extensive provision for the refinancing of farm mortgages which Congress has already made, shows that the gravity of the situation has been appreciated. The province of the Court is limited to deciding whether the Frazier-Lemke Act as applied has taken from the Bank without compensation, and given to Radford, rights in specific property which are of substantial value. . . . As we conclude that the Act as applied has done so, we must hold it void. For the Fifth Amendment commands that, however great the Nation's need, private property shall not be thus taken even for a wholly public use without just compensation. If the public interest requires, and permits, the taking of property of individual mortgagees in order to relieve the necessities of individual mortgagors, resort must be had to proceedings by eminent domain; so that, through taxation, the burden of the relief afforded in the public interest may be borne by the public.

PERRY v. UNITED STATES.

Supreme Court of the United States.
 294 U. S. 330 (1935).

MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court.

The Certificate from the Court of Claims shows the following facts:

Plaintiff brought suit as the owner of an obligation of the United States for \$10,000, known as "Fourth Liberty Loan 4¼ % Gold Bond of 1933-1938." The bond provided: "The principal and interest hereof are payable in United States gold coin of the present standard of value."

Plaintiff alleged that at the time the bond was issued, and when he acquired it, a dollar in gold consisted of 25.8 grains of gold .9 fine; that defendant refused to redeem the bond "except by the payment of \$10,000 in legal tender currency"; that [this refusal was] based on the Joint Resolution of the Congress of June 5, 1933 (48 Stat. 113), but that this enactment was unconstitutional as it operated to de-

prive plaintiff of his property without due process of law; and that, by this action of defendant, he was damaged "in the sum of \$16,931.25, the value of defendant's obligation [in legal tender currency], for which, with interest, plaintiff demanded judgment. . . .

First. The import of the obligation. The bond in suit differs from an obligation of private parties, or of States or municipalities, whose contracts are necessarily made in subjection to the dominant power of the Congress. *Norman v. Baltimore & Ohio R. Co.*, decided this day, *ante*, p. 240. The bond now before us is an obligation of the United States. The terms of the bond are explicit. They were not only expressed in the bond itself, but they were definitely prescribed by the Congress. . . . The circular of the Treasury Department of September 28, 1918, . . . also provided that the principal and interest "are payable in United States gold coin of the present standard of value."

This obligation must be fairly construed. The "*present* standard of value" stood in contradistinction to a *lower* standard of value. The promise obviously was intended to afford protection against them. . . .

The Government states in its brief that the total unmatured interest-bearing obligations of the United States outstanding on May 31, 1933, (which it is understood contained a "gold clause" substantially the same as that of the bond in suit,) amounted to about twenty-one billions of dollars. From statements at the bar, it appears that this amount has been reduced to approximately twelve billions at the present time, and that during the intervening period the public debt of the United States has risen some seven billions (making a total of approximately twenty-eight billions five hundred millions) by the issue of some sixteen billions five hundred millions of dollars "of non-gold-clause obligations."

Second. The binding quality of the obligation. The question is necessarily presented whether the Joint Resolution of June 5, 1933 (48 Stat. 113) is a valid enactment so far as it applies to the obligations of the United States. The Resolution declared that provisions requiring "payment in gold or a particular kind of coin or currency" were "against public policy," and provided that "every obligation, heretofore or hereafter incurred . . . shall be discharged "upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts." This enactment was expressly extended to obligations of the United States, and provisions for payment in gold, "contained in any law authorizing obligations to be issued by or under authority of the United States," were repealed.

There is no question as to the power of Congress to regulate the value of money, that is, to establish a monetary system and thus to determine the currency of the country. The question is whether the Congress can use that power so as to invalidate the terms of the obligations which

the Government has theretofore issued in the exercise of the power to borrow money on the credit of the United States. In attempted justification of the Joint Resolution in relation to the outstanding bonds of the United States, the Government argues that "earlier Congresses could not validly restrict the 73rd Congress from exercising its constitutional powers to regulate the value of money, borrow money, regulate foreign and interstate commerce"; and, from this premise, the Government seems to deduce the proposition that when, with adequate authority, the Government borrows money and pledges the credit of the United States, it is free to ignore that pledge and alter the terms of its obligations in case a later Congress finds their fulfillment inconvenient. The Government's contention thus raises a question of far greater importance than the particular claim of the plaintiff. On that reasoning, if the terms of the Government's bond as to the standard of payment can be repudiated, it inevitably follows that the obligation as to the amount to be paid may also be repudiated. The contention necessarily imports that the Congress can disregard the obligations of the Government at its discretion and that, when the Government borrows money, the credit of the United States is an illusory pledge.

We do not so read the Constitution. . . . To say that the Congress may withdraw or ignore that pledge, is to assume that the Constitution contemplates a vain promise, a pledge having no other sanction than the pleasure and convenience of the pledgor. This Court has given no sanction to such a conception of the obligations of our Government. . . .

The argument in favor of the Joint Resolution, as applied to government bonds, is in substance that the Government cannot by contract restrict the exercise of a sovereign power. But the right to make binding obligations is a competence attaching to sovereignty. In the United States, sovereignty resides in the people, who act through the organs established by the Constitution. . . . The Congress as the instrumentality of sovereignty is endowed with certain powers to be exerted on behalf of the people in the manner and with the effect the Constitution ordains. The Congress cannot invoke the sovereign power of the people to override their will as thus declared. The powers conferred upon the Congress are harmonious. The Constitution gives to the Congress the power to borrow money on the credit of the United States, an unqualified power, a power vital to the Government,—upon which in an extremity its very life may depend. The binding quality of the promise of the United States is of the essence of the credit which is so pledged. . . . The fact that the United States may not be sued without its consent is a matter of procedure which does not affect the legal and binding character of its contracts. While the Congress is under no duty to provide remedies through the courts, the contractual obligation still exists and, despite

infirmities of procedure, remains binding upon the conscience of the sovereign. . . .

Third. The question of damages. That is a distinct question. Because the Government is not at liberty to alter or repudiate its obligations, it does not follow that the claim advanced by the plaintiff should be sustained. The action is for breach of contract. As a remedy for breach, plaintiff can recover no more than the loss he has suffered and of which he may rightfully complain. He is not entitled to be enriched. . . .

In considering what damages, if any, the plaintiff has sustained by the alleged breach of his bond, it is hence inadmissible to assume that he was entitled to obtain gold coin for purposes contrary to the control over gold coin which the Congress had the power to exert, and had exerted, in its monetary regulation. Plaintiff's damages could not be assessed without regard to the internal economy of the country at the time the alleged breach occurred. . . . A free domestic market for gold was non-existent.

. . . . Plaintiff has not attempted to show, that in relation to buying power he has sustained any loss whatever. . . .

MR. JUSTICE STONE, concurring. . . . In this posture of the case it is unnecessary, and I think undesirable, for the Court to undertake to say that the obligation of the gold clause in Government bonds is greater than in the bonds of individuals, or that in some situation not described, it has imposed restrictions upon the future exercise of the power to regulate the currency. . . .

. . . . Here it is declared that there is no damage. . . . It would seem that this would suffice to dispose of the present case, without attempting to prejudge the rights of other bondholders and of the Government under other conditions which may never occur. . . .

MR. JUSTICE McREYNOLDS, dissenting.

MR. JUSTICE VAN DEVANTER, MR. JUSTICE SUTHERLAND, MR. JUSTICE BUTLER and I conclude that, if given effect, the enactments here challenged will bring about confiscation of property rights and repudiation of national obligations. . . .

CHAPTER IV

Due Process of Law

THE SUBSTANCE OF JUSTICE AND FAIR DEALING

The concept of due process of law is grounded in the 39th chapter of *Magna Carta* (the 29th of the edition of 1125), although the phrase does not occur there.¹ The words are, *Nullius liber homo capiatur, vel imprisonetur, aut disseisiatur, aut utlagetur, aut exuletur, aut aliquo modo destruatur, nec super eum ibimus, nec super eum mittemus, nisi per legale iudicium parium suorum vel per legem terre*. The critical words are, of course, *per legale iudicium parium suorum vel per legem terre*. Professor McIlwain translates them freely as follows: "No free man should be arrested or imprisoned or disseised or outlawed or exiled or in any manner destroyed; nor will we go upon him, nor will we send upon him, except upon a legal judgment of his peers, or by the justices of the King in cases in which this has been the common procedure, the 'law of the land' in effect everywhere and accepted as such."

Daniel Webster laid down a definition of the phrase, "law of the land", in the course of his argument in the *Dartmouth College Case*, in 1819: "By law of the land, is most clearly intended, the general law; a law, which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is, that every citizen shall hold his life, liberty, and property, and immunities under the protection of the general rules which govern society."²

The notion of due process arrived in America filtered through Coke's Institutes. It was then identified with and equivalent to the law of the land. The law of the land was the common law of England, so that process was "due" if it was according to the general English law. Due process was legal process as custom and tradition had given it sanction. Webster's definition of the law of the land was therefore also a definition of due process in its historical purity.

At least since the time of King John, the law of the land had been thought of as a barrier to arbitrary government. Arbitrary government was usually thought of as government by whim of the sovereign. The

¹ C. H. McIlwain, "Due Process of Law in Magna Carta," 14 *Col. Law Rev.* 27 (1914). Selected Essays, *op. cit.*, i. 174, 202.

² Daniel Webster, *Speeches and Forensic Arguments* (3 vols., 8th ed., Boston, 1850), i., 110, 128.

notion of arbitrariness did not include harshness, or rigor, or close regulation, until the American judiciary made it do so. The barrier which the law of the land set up was a constraint, rather than a limitation of power. It was thrown around persons and their property for the protection of private rights. The requirement of due process confined the exertion of governmental power to accepted procedure, and so prevented or attempted to prevent the capricious exertion of that power.

By the time when the British colonists were reading Coke and Blackstone, the sovereignty of Parliament—King, Lords and Commons—was the prevailing characteristic of British constitutionalism. An act of Parliament was then, as now, paramount law, constitutional, and due process. No British court could decline in the exercise of its judicial function to apply a parliamentary statute. Rhetorical appeals to a higher law there might be, but no such law was known to the courts and binding on the judges. The common law was maintained because sovereign and people were interested in preserving it, and not because it controlled the exertion of legislative power. Furthermore, the common law was not untouchable. It has always been subject to alteration by statute, that is, by act of Parliament, and the resultant change has become absorbed in the law of the land. Due process has none the less remained legal process, process under the forms of law.

In America, the presence of written constitutions beyond the reach of amendment by the legislative power created a situation alien to the English legal system. These constitutions provided another change equally profound—the separation of the executive and judicial functions of government from control by the legislature. The American system thus put it within the power of the courts successfully to contradict the legislature, and to apply a judicial concept of due process as against the legislative will. Although the constitutions which guaranteed government by due process of law did not define the phrase, neither did they stipulate that the legislative definition of it should bind the judiciary.

The framers of the Constitution did not put the due process clause into that instrument. It does not appear either as a prohibition on the central government or as one of those on the states. The clause was included in the bill of rights which the ratifying conventions throughout the Union advocated as an essential condition to the coming into effect of the new Constitution. It appears there, in the Fifth Amendment, as a limitation of the federal power. The clause was not laid upon the states until 1868.

During that first three-quarters of a century, the states were accustomed to the possession of the police power, for they had never surrendered it. The police power was thought to be intimately essential to the functions of government because it was conceived of as having for

its objective those primary purposes for which (so it was believed) government was instituted. The exertion of it inevitably, of course, brought a collision with private rights. Both the legislatures and the courts were from the beginning faced with the problem of reconciling private interest with that of the public. From the beginning, too, they were confronted with the unsavory duty of attempting to check private enterprise seeking aggrandizement by the device of clothing itself in the disguise of a public project. Legislatures, being political bodies, proved themselves vulnerable to organized pressure. The responsibility for protecting the public from this type of legislation fell to the courts.

The judges had ample conceptual material at their disposal for the discharge of this task. The federal Constitution proclaimed itself the supreme law of the land, and the several state constitutions were controlling within their respective jurisdictions. Every legislature in the Union possessed powers that were to some degree limited by a superior law. And finally, since the courts were the only authoritative interpreters of these governing instruments, any theory which the judiciary might choose to read into them became by that reading itself overruling law. There was therefore no lack of well-received doctrine from which the judicial power might draw ethical (societal) values with which to restrain legislation. It is well to note again, so that it will not be forgotten, that the judicial power has expanded on the whole not through a process of calculation, but through a process of ripening, as doctrine has developed by the means of decided cases. Restraints now found inherent in the meaning of due process were then imposed through the medium of other provisions of the applicable constitution, or were invoked by an appeal to general law, the law of the land.

In order to give these generalizations some embodiment, excerpts³ from the leading state decisions applying the law of the land during this period appear below.

BOWMAN v. Middleton, 1 Bay 252, 254 (1792). An act of the legislature, passed in 1712, which transferred parts of a certain freehold from the heirs at law to other persons, was held unconstitutional. "The plaintiffs could claim no title under the act in question, as it was against common right, as well as against *magna charta*, to take away the freehold of one man and vest it in another, and that, too, to the prejudice of third persons, without any compensation, or even trial by the jury of the country, to determine the right in question."

TRUSTEES OF THE UNIVERSITY v. Foy, 1 Murphy 58; 3 American Decisions 672, 677 (1805). The University of Maryland possessed confiscated property which had been granted it by the state legislature. The legislature

³ The cases from which these quotations are taken were selected by the editor from E. S. Corwin, "The Higher Law Background of American Constitutional Law," 42 *Harv. Law Rev.*, 149 and 366 (1928), and, chiefly, from his article, "Due Process before the Civil War," 24 *ibid.*, 366 (1910).

later divested the University of the lands. The court extends due process to corporations: "It seems to us to warrant a belief that members of a corporation as well as individuals shall not be so deprived of their liberties or property, unless by a trial by jury in a court of justice according to the known and established rules of decision derived from the common law, and such acts of the legislature as are consistent with the constitution. . . ."

GARDNER v. Newburgh, 2 Johnson Ch. 161; 7 Am. Dec. 527, 528, 530 (1816). Injunction sought against the town of Newburgh to prevent the diversion of a stream flowing through plaintiff's land. The owner of the spring which fed the stream had agreed to the diversion and had received compensation from the town. KENT, Chancellor. . . . It is a clear principle in law, that the owner of land is entitled to the use of a stream of water which has been accustomed, from time immemorial, to flow through it. It is a part of the freehold of which no man can be disseised but by lawful judgment of his peers, or by due process of law. This is an ancient and fundamental maxim of common right to be found in *Magna Charta*. . . .

VANZANT v. Waddell, 2 Yerger 260, 270 (1829). CATRON, J. . . . The right to life, liberty, and property, of every individual, must stand or fall by the same rule or law that governs every other member of the body politic, or "LAND", under similar circumstances; and every partial or private law, which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. . . .

The clause, "LAW OF THE LAND," means a general and public law, equally binding upon every member of the community.

BANK OF THE STATE v. Cooper, 2 Yerger 599; 24 Am. Dec. 517, 535 (1831). The legislature had created a special court to hear and determine all cases against the Bank without appeal from its decisions. GREEN, J. . . . By "law of the land" is meant a general and public law, operating equally upon every individual in the community. . . . KENNEDY, J. . . . At the time when our constitution was formed, these words had assigned to them a specific and definite signification. . . . If so, we are obliged to give the same meaning which was known to have been assigned them by the law at that time; for the purpose of ascertaining the import of these words, it is unnecessary to refer to their origin. The history of *Magna Charta* is identified with the law. . . .

[He cites with approval *Vanzant v. Waddell*.]

HOKE v. Henderson, 4 Devereux 1; 25 Am. Dec. 677, 688 (1833). The legislature in 1832 substituted the method of election for that of appointment of county clerks and clerks of superior courts. Hoke, elected clerk of Lincoln County under this law, brought an action against Henderson, the appointed incumbent, for possession of the office.

"Those terms, 'law of the land,' do not mean merely an act of the general assembly. If they did, every restriction upon legislative authority would be at once abrogated. . . .

"In reference to the infliction of punishment and divesting (*sic*) of the rights of property, it has been repeatedly held in this state, and it is believed in every other of the union, that there are limitations upon the legislative power, notwithstanding those words; and that the clause itself means that such legislative acts as profess in themselves directly to punish persons, or to deprive the citizen of his property, without trial before the judicial tribunals,

and a decision upon the matter of right, as determined by the laws under which it vested, according to the course, mode, and usages of the common law, as derived from our forefathers, are not effectively 'laws of the land,' for those purposes. . . ."

[The construction given to the phrase, law of the land, was cited with approval by other state courts. 25 Am. Dec. 703, note.]

REGENTS OF THE UNIVERSITY OF MARYLAND v. Williams, 9 Gill — Johnson 365; 31 Am. Dec. 72, 91 (1838). "Independent of that instrument [an act of incorporation], and of any express restriction in the constitution of the state, there is a fundamental principal of right and justice, inherent in the nature and spirit of the social compact (in this country at least), the character and genius of our government, the causes from which they sprang, and the purposes for which they were established, that rises above and restrains and sets bounds to the power of legislation, which the legislature cannot pass without exceeding its rightful authority. It is that principle which protects the life, liberty, and property of the citizen from violation, in the unjust exercise of legislative power."

TAYLOR v. Porter, 4 Hill 140; 40 Am. Dec. 274, 278 (1843). Trespass for laying a private road over plaintiff's property. Defense showed that the road was built by state commissioners of highways under state authority. After resting the phrase, law of the land, on *Magna Charta*, and quoting the relevant passage from *Hoke v. Henderson*, the court says: "The meaning of the section then seems to be that no member of the state shall be disfranchised, or deprived of any of his rights or privileges, unless the matter shall be adjudged against him upon trial had according to the course of the common law. It must be ascertained judicially that he has forfeited his privileges, or that someone else has a superior title to the property he possesses, before either of them can be taken from him. It cannot be done by mere legislation. . . ."

"The words 'due process of law,' in this place, can not mean less than a prosecution or suit instituted and conducted according to the prescribed forms and solemnities for ascertaining guilt, or determining the title to property. It will be seen that the same measure of protection against legislative encroachment is extended to life, liberty, and property, and if the latter can be taken without a forensic trial and judgment, there is no security for the others. . . . But none of these things can be done by mere legislation. There must be 'due process of law'."

[This case was perhaps the most widely relied on among the due process cases in the state courts. Am. Dec., *loc. cit.* The Supreme Court of the United States referred favorably to it in *Murray's Lessee v. Hoboken Land Co.*, 18 Howard 272, 280 (1856), as having interpreted judicially the meaning of the term, law of the land.]

These fragments show a certain judicial agreement on the subject, with its own point of view and its own vocabulary. *Magna Carta* is cited in *Bowman v. Middleton*, *Gardner v. Newburgh*, *Bank v. Cooper*, and *Taylor v. Porter*. The phrase, law of the land, occurs in *Vanzant v. Waddell*, *Bank v. Cooper*, *Hoke v. Henderson* and *Taylor v. Porter*. The common law, a synonymous term, is cited in *University v. Foy*. Chancellor Kent seems to identify *Magna Carta*, due process of law and

the common law. The same reasoning is followed in *Taylor v. Porter*. All of the opinions agree that the general law binds the legislative will.

How far the meaning of these terms can be pressed to precision is a question of some obscurity.⁴ The trend of the decisions, however, is clear. Emphasis is placed on the usages of the common law. These usages are held essential to the constitutionality of law because they prevent individual (property) rights from being arbitrarily divested. Deprivation of property without due procedure is unconstitutional, and therefore void of legal effect. Furthermore, due procedure is not any procedure which may be concocted to meet the exigency, but ancient procedure. The phrase, due process of law, occurs explicitly in *Gardner v. Newburgh* and *Taylor v. Porter*.

University of Maryland v. Williams is unique in this list of cases in that it invokes simply a general principle of justice. This is not to say that the thought there is alien, but merely that the court goes to an extreme in relying upon it directly instead of collaterally. The other opinions leave one somehow with the impression that the usages of the general law are founded upon a universal principle of right. This feeling, however, is drawn from the respect with which the courts treated the common law of England, and not from a conviction that the usages in question were sacrosanct as being derived from natural law. The common law was not thought to be a part of the law of nature.

The concept of due process, then, inhibits the expression of the legislative will when that will seeks fulfillment in the form of a statutory enactment. It prescribes, specifically, that legislation involving the taking of life or property—whether in the concrete or in the abstract—must do the taking in conformity with accustomed legal forms and practices. Thus stated, due process can be readily seen to be a principle of law-making; and, furthermore, a principle of judicial construction where the constitutionality of such a law is being tested in the courts.

The cases reproduced in this chapter begin at this stage of the doctrine. This is to say, that they apply the fully developed conception of procedural due process. It may be stated here to avoid possible misconception that the federal Supreme Court shared the views expressed in the state courts at this time. The classic statement of this position occurs in the case of *Murray's Lessee v. Hoboken Land and Improvement Co.*, 18 How. 272 (1855). The Collector of the Port of New York had been found to owe the United States the sum of \$1,374,119.65. In order to recover this debt, the Solicitor of the Treasury, by virtue of an Act of Congress, had ordered a federal marshal to sell the property of the Collector. The pertinent extract from the opinion is as follows:

⁴For the ramifications of the subject the student must avail himself of the bibliography at the end of this note.

MR. JUSTICE CURTIS. . . . It must be admitted that, if the auditing of this account, and the ascertainment of its balance, and the issuing of this process, was an exercise of the judicial power of the United States, the proceeding was void; for the officers who performed these acts could exercise no part of that judicial power. . . .

Taking these two objections together, they raise the questions, whether, under the Constitution of the United States, a Collector of Customs, from whom a balance of account has been found to be due by accounting officers of the Treasury, designated for that purpose by law, can be deprived of his liberty or property, in order to enforce payment of that balance, without the exercise of the judicial power of the United States, and yet by due process of law ; and if so, then, second, whether the warrant in question was such due process of law?

The words "due process of law," were undoubtedly intended to convey the same meaning as the words "by the law of the land," in *Magna Charta*. Lord Coke, in his commentary on those words (2 Inst., 50) says, they mean due process of law. . . .

That the warrant now in question is legal process, is not denied. . . . But is it "due process of law?" The Constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave Congress free to make any process "due process of law," by its mere will. To what principles, then, are we to resort to ascertain whether this process, enacted by Congress, is due process? To this the answer must be twofold. We must examine the Constitution itself, to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country. . . .

Tested by the common and statute law of England prior to the emigration of our ancestors, and by the laws of many of the States . . . the proceedings authorized by the Act . . . cannot be denied to be due process of law, when applied to the enforcement and recovery of balances due to the Government from a Collector of Customs, unless there exists in the Constitution some other provision which restrains Congress from authorizing such proceedings. For, though "due process of law" generally implies and includes *actor, reus, judex*, regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceedings . . . , yet, this is not universally true. . . .

The power to collect and disburse revenue, and to make all laws that shall be necessary and proper for carrying that power into effect, includes all known and appropriate means of effectually collecting and disbursing that revenue, unless some such means should be forbidden in some other part of the Constitution. . . .

To sum up: At the point at which we take up our cases, due process performed two functions. In the first place, it worked as a principle which limited legislative power. In the second place, it prescribed a formula which dictated the method by which the legislative power should be exerted in the field covered. This in brief statement was the fully developed conception of procedural due process.

But this doctrine or principle—it may be viewed in either way—was found from the start to be self-limited, and limited so seriously that the courts occasionally floundered in ambiguities. The difficulties thus produced took the following type-forms:

First. Due process, “tested by the common and statute law of England prior to the emigration of our ancestors” proved a barrier to innovation, reform, and the meeting of needs created by the growth of modern society and the accompanying expansion of governmental regulation.

The remedy for this rigidity in the legal and constitutional structure lay with the courts. They could either maintain the accustomed usages and “molds”, or they could sanction deviations from and substitutions for them. When they chose the latter course, they constitutionalized it by basing it on the principle that new procedures were due process when they served the ends of substantial justice.

An example of this situation is presented by the case of *Hurtado v. California*, 110 U. S. 516 (1884) California had substituted prosecution by information for prosecution by indictment in certain classes of criminal cases. Under this law, Hurtado was held for murder after the district attorney of the county wherein the crime was committed had filed the required information with the local magistrate, without any presentment or indictment of a grand jury. Reference to the case will show that Hurtado’s argument was the familiar one that “due process” means “law of the land” as found in *Magna Carta*;

that by immemorial usage it has acquired a fixed, definite, and technical meaning; that it refers to and includes, not only the general principles of public liberty and private right, . . . but the very institutions which, venerable by time and custom, have been tried by experience and found fit and necessary for the preservation of those principles, and which, having been the birthright and inheritance of every English subject, crossed the Atlantic with the colonists and were transplanted and established in the fundamental laws of the State. . . .

The Court answers:

There is nothing in *Magna Charta*, rightly construed as a broad charter of public right and law, which ought to exclude the best ideas of all systems and of every age; and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not

to assume that the sources of its supply have been exhausted. On the contrary, we should expect that the new and various experiences of our own situation and system will mould and shape it into new and not less useful forms. . . .

Applied in England only as guards against executive usurpation and tyranny, here (these broad and general maxims of liberty and justice) have become bulwarks also against arbitrary legislation; but, in that application, as it would be incongruous to measure and restrict them by the ancient customary English law, they must be held to guarantee, not particular forms of procedure, but the very substance of individual rights to life, liberty, and property. . . .

It follows that any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law. . . .

The Court cites the opinions in *Munn v. Illinois* and *Davidson v. New Orleans*, which are appended below. We have here, then, a line of cases clearly pivoting on this particular difficulty in the doctrine of procedural due process. The trend of judicial reasoning advances from the position that legal process is due process if it means conformity to certain historical tests, to the position that legal process is due process if it serves the public welfare in obedience to general principles of justice and reason.

Second. But there was also inherent in the matured doctrine a contradiction of profound import. It was theoretically possible for a legislative body to adhere closely to orthodox due process and yet to act arbitrarily. It was, furthermore, in the judgment of the courts, practically possible. The type-situation here arises when a legislature invokes the public welfare either to deprive a person of his property rights or to circumscribe his right to exercise them. The earliest examples of this form of the problem are to be found, of course, in the post-Revolutionary state legislation confiscating the lands of the British loyalists, and in the various acts of relief passed to shelter debtors from the pressure of their creditors. During this early period, the identification of "due process of law" with the "law of the land" allowed the state and federal courts to meet on common ground to develop a coherent doctrine, and, at the same time, mitigated the effects of the absence of the Fourteenth Amendment from the federal Constitution. Thus a body of doctrine was being prepared (unconsciously) which could be deposited in that Amendment, when, after the Civil War, the states undertook to regulate common carriers and other public service corporations.

Now, granting that a legislative enactment was arbitrary if it failed in due process, the problem posed for the courts was, how could such an act be arbitrary if it *conformed* to due process? Or, put in the early

terminology, how could a legislative act be held arbitrary if it conformed to the law of the land?

There were two answers. The first was that an arbitrary act violated by that fact the law of the land and failed in due process of law. The other one was contingent on the definition of the word "arbitrary."

The first answer may be shortly disposed of, for it has already been explained by implication. The key to it is in the shift in doctrine from a rigid, technical conception of due process as simply immemorial usage to the conception of due process as containing the "substance" of individual rights.

The other answer, however, was not given so definitely. The cases reveal three stages in the evolution of the meaning of the word "arbitrary." The first one was simple: arbitrary meant tyrannical. To be tyrannical was, as has been noted above, to be self-willed, uncontrolled by constitutionalism or by a legal system. It will be perceived at once that this idea of arbitrariness fitted well with the definition of due process as procedure according to accepted law. Thus the liberty of life and property was thought to be safeguarded from despotism, and the individual could be neither oppressed in the possession of his rights, nor favored at the expense of other individuals.

The next stage was arrived at because persons claiming that their rights had been infringed insisted upon an adjudication. Here the questions raised were more difficult of solution, but still they did not force upon the courts any great problem. This problem, reduced to its simplest terms, was whether the deprivation complained of was a reasonable remedy for the curing of an admitted public evil. And the response of the courts was, that it was reasonable if it was plainly adapted to the accomplishment of the end in view.

Commonwealth v. Alger, 7 Cushing 53 (1851), defines this position for the period extending from the beginning down to the seventies and eighties—to the time when the states were active in the regulation of the great corporations. "Rights of property," said the Chief Justice, "like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment, as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law, as the legislature . . . may think necessary and expedient. . . ." It should be noted that the crux of this principle, the thing that gives it particularity here, is not, that property rights are subject to limitation, but that they are subject to limitation which the *legislature* may think proper. Any doubt that this is the force of the principle stated is removed by a further observation later in the opinion: "Whether any restraint upon the use of land [property] is necessary to the preservation of common rights and the public security, must depend upon circumstances, to be

judged of by those to whom all legislative power is intrusted by the sovereign authority of the State, so to declare and regulate as to secure and preserve all public rights. . . ." *Munn v. Illinois* carries this whole position into the period of state regulation after the Civil War, and does so within the terms of the Fourteenth Amendment. There is no claim, certainly, and apparently no thought, either, that the courts have as a part of the judicial function the right to substitute their judgment for that of the legislature.

There were two points at which the courts could extend their power of review if they were minded to do so. They could (a) question the end which was the objective of the legislative enactment, or they could (b) question the enactment itself as an unreasonable means for the accomplishment of the objective. In 1885 the highest court in the state of New York took this step. It brings to a close that phase of the doctrine of due process which has so far been considered. The New York legislature had prohibited the manufacture of cigars and the preparation of tobacco in tenement houses in certain cases. The crucial passage in the opinion of the court is this:

Generally it is for the legislature to determine what laws and regulations are needed to protect the public health and secure the public comfort and safety, and while its measures are calculated, intended, convenient and appropriate to accomplish these ends, the exercise of its discretion is not subject to review by the courts. But they must have some relation to these ends. Under the mere guise of police regulations, personal rights and private property cannot be arbitrarily invaded, and the determination of the legislature is not final and conclusive. If it passes an act ostensibly for the public health, and thereby destroys or takes away the property of a citizen, or interferes with his personal liberty, then it is for the courts to scrutinize the act and see whether it really relates to and is convenient and appropriate to promote the public health. Such a declaration does not conclude the courts, and they must yet determine the fact declared and enforce the supreme law.

This quotation comes from *In re Peter Jacobs*, 98 N. Y. 98 (1885). It marks the close of the second stage and the opening of the third in the development of the doctrine of due process. Five years afterwards the Supreme Court of the United States took the same stand in *Chicago, Milwaukee & St. Paul Ry. Co. v. Minnesota*. Thus the judiciary met the difficulty presented by the legislative cloaking of illegitimate ends in the guise of due process. They assumed the function of making an independent judgment.

The result of this expansion of the judicial function was that the substance of due process lost the finality which had characterized it when it was subject only to legislative determination. The New York court might have sustained the tobacco law, as the cases which both precede and follow it show.

In the main line of the development of the conception of due process, the effect of the new development was to broaden the meaning of arbitrariness. It now came to mean unreasonableness and unfairness in an ethical sense as contrasted with its former meaning of unreasonableness in a practical and technical sense. Both the legal profession and dissenting judges had long advocated the assumption by the courts of the duty of regarding unfairness as violative of the constitutional system. Leading examples of dissenting opinions stating this view are given in the federal cases to follow. Unfairness, unreasonableness, arbitrariness, or caprice had always been attributed to legislation restricting private rights in behalf of the social well-being. The problem had been (for this school of thought) first, to persuade the courts to weigh these qualities, and then to persuade them further to adopt them as grounds for the nullification of a law held to embody them. When the courts at length assumed this duty, they were not so much marking out new concepts of the judicial function as they were simply yielding to pressure. The application of the new concept of due process, therefore, was not predominantly the placing of new restrictions on state power. It was, rather, the canalizing of a whole mass of scattered restrictions. The judicial concepts of justice and reason were shifted from the social compact, or elsewhere, and injected into the notion of due process. The Fourteenth Amendment came to sum up all such constraints and to be regarded as in itself a delimitation of the police power of the states. The Fourteenth Amendment provided for the state judiciaries the means of formalizing the concept of the law of the land. It gathered within itself, at their hands, those restrictions on the police power which had been held from time immemorial to mark its confines.

For the federal judiciary, and for the Supreme Court of the United States, it did this also; but for the Supreme Court, it did something more: it placed the construction of the police power within its control. The police power is peculiarly the states' own. It covers the protection and control of the daily life of the common man. It permeates social life at all points where the activity of that life subsists within the state frontiers. It regulates the life of the individual in its relation to the life of society. The Supreme Court, nevertheless, was not a stranger to the problems inherent in the exertion of such authority. It was not unfamiliar with the subtleties of its many-sided manifestations. Ever since *Swift v. Tyson*, 16 Peters 1, that tribunal had been applying its own interpretations of the general law within the area occupied by the police power. But, prior to the Fourteenth Amendment, that supervision was neither constitutionalized nor absolute. It rested singly and entirely on the refusal of the Supreme Court to apply the interpretations prevailing in the states, and upon its insistence on its own exegesis. The appear-

ance of the due process clause in the Fourteenth Amendment as a constitutional inhibition on the states' police power legitimized the Supreme Court's position. It permitted that tribunal to fuse its notions of the general law with due process and then to apply the resulting doctrine within the states' jurisdictions.

The federal cases in the section to come are illustrative of this development. *Munn v. Illinois* contains the classic, and, until the New Deal, the broadest statement of the relation of due process to the police power. Then, with the case of the *Chicago, Milwaukee & St. Paul Ry. Co.*, Mr. Justice Field's position in the *Slaughter-House* dissent is adopted by a majority of his brethren, and the doctrine of reasonableness is announced. It is reaffirmed in the final case reproduced, and the connection with due process is made integral. The *C. M. & St. P. Ry.* case has been given in connection with the preceding study of the scope of judicial review. Its place in the expansion of the concept of due process, however, is so essential that it is cited again in the present subject to indicate the scope of the judicial review of administrative acts.

Thus the Supreme Court became, as of constitutional right, the highest court within each state in cases within the domain of the police power. And here it remained until 1938. In that year, Mr. Justice Brandeis, speaking for the Court in *Erie Railroad v. Tompkins*, returned to the states their construction of the common law. But repeal the Fourteenth Amendment, Mr. Justice Brandeis could not; the Supreme Court's construction of due process still must mark out the limits of the police power of the states.

It will have become apparent to the student that the study of due process is inseparable from a study of the police power. This chapter and the next are simply two divisions of the same subject. The dividing line is arbitrary and the titles to the chapters are merely points of accent. The federal cases presented in this chapter are keyed to the one next following. The whole subject may be unified by keeping in mind these three propositions:

1. The (legal) right of a person to pursue a common calling is deeply ingrained in the jurisprudence of the Supreme Court. It comes to rest within the doctrine of due process and attaches itself to the word "liberty." The incidents of such a pursuit fall within the meaning of the term "property."

2. The two-fold right of a person to do (a) his own work (b) in his own way has been the constitutional obstacle to regulation of his conduct in his trade or business by government.

3. The due process clause of the Fourteenth Amendment has been the most frequently invoked and the most formidable of the barriers to

the exercise of governmental power in the field of social legislation, that is to say, within the field of the police power.

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The Concept of Due Process in the Supreme Court

DAVIDSON v. NEW ORLEANS.

Supreme Court of the United States. 1878.
 96 U.S. 97.

[The city of New Orleans, in pursuance of a statute of Louisiana, sought to make an assessment on certain real estate within the parishes of Carroll and Orleans to drain the swamp lands there. Included in the assessment was land which was part of the estate of John Davidson; this land was assessed for \$50,000. His widow and executrix protested the

assessment, which was set aside by the court of first instance, but restored by the state supreme court. Mrs. Davidson brought this judgment before the Supreme Court of the United States on writ of error.]

MR. JUSTICE MILLER delivered the opinion of the court. . . .

It is easy to see that when the great barons of England wrung from King John, at the point of the sword, the concession that neither their lives nor their property should be disposed of by the crown, except as provided by the law of the land, they meant by "law of the land" the ancient and customary laws of the English people, or laws enacted by the Parliament of which those barons were a controlling element. It was not in their minds, therefore, to protect themselves against the enactment of laws by the Parliament of England. But when, in the year of grace 1866, there is placed in the Constitution of the United States a declaration that "no State shall deprive any person of life, liberty, or property without due process of law," can a State make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the States is of no avail, or has no application where the invasion of private rights is effected under the forms of State legislation. . . .

A most exhaustive judicial inquiry into the meaning of the words "due process of law," as found in the Fifth Amendment, resulted in the unanimous decision of this court, that they do not necessarily imply a regular proceeding in a court of justice, or after the manner of such courts. *Murray's Lessee v. Hoboken Land & Improvement Co.*, 12 How. 272. . . .

It is not a little remarkable, that while this provision has been in the Constitution of the United States, as a restraint upon the authority of the Federal government, for nearly a century, and while, during all that time, the manner in which the powers of that government have been exercised has been watched with jealousy, and subjected to the most rigid criticism in all its branches, this special limitation upon its powers has rarely been invoked in the judicial forum or the more enlarged theatre of public discussion. But while it has been a part of the Constitution, as a restraint upon the power of the States, only a very few years, the docket of this court is crowded with cases in which we are asked to hold that state courts and state legislatures have deprived their own citizens of life, liberty, or property without due process of law. There is here abundant evidence that there exists some strange misconception of the scope of this provision as found in the Fourteenth Amendment. In fact, it would seem, from the character of many of the cases before us, and the arguments made in them, that the clause under con-

sideration is looked upon as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a state court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded. If, therefore, it were possible to define what it is for a State to deprive a person of life, liberty, or property without due process of law, in terms which would cover every exercise of power thus forbidden to the State, and exclude those which are not, no more useful construction could be furnished by this or any other court to any part of the fundamental law.

But, apart from the risk of a failure to give any definition which would be at once perspicuous, comprehensive, and satisfactory, there is a wisdom, we think, in the ascertaining of the intent and application of such an important phrase in the Federal Constitution, by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded. This court is, after an experience of nearly a century, still engaged in defining the obligation of contracts, the regulation of commerce, and other powers conferred on the Federal government, or limitations imposed upon the States.

As contributing, to some extent, to this mode of determining what class of cases do not fall within its provision, we lay down the following proposition, as applicable to the case before it:—

That whenever by the laws of a State, or by state authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be for the whole State or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections.

It may violate some provision of the state constitution against unequal taxation; but the Federal Constitution imposes no restraint on the States in that regard. . . . It may possibly violate some of those principles of general constitutional law, of which we could take jurisdiction if we were sitting in review of a Circuit Court of the United States, as we were in *Loan Association v. Topeka*, 20 Wall. 655. But however this may be, or under whatever other clause of the Federal Constitution we may review the case, it is not possible to hold that a party has, without due process of law, been deprived of his property, when, as regards the issues affecting it, he has, by the laws of the State, a fair trial in a court of justice, according to the modes of proceeding applicable to such a

case. This was clearly stated by this court, speaking by the Chief Justice, in *Kennard v. Morgan* (92 U.S. 480). . . .

This proposition covers the present case. Before the assessment could be collected, or become effectual, the statute required that the tableau of assessments should be filed in the proper District Court of the State; the personal service of notice, with reasonable time to object, should be served on all owners who were known and within reach of process, and due advertisement made as to those who were unknown, or could not be found. This was complied with; and the party complaining here appeared, and had a full and fair hearing in the court of the first instance, and afterwards in the Supreme Court. If this be not due process of law, then the words can have no definite meaning as used in the Constitution.

One or two errors assigned, and not mentioned in the earlier part of this opinion, deserve a word or two.

It is said that the plaintiff's property had been previously assessed for the same purpose, and the assessment paid. If this be meant to deny the right of the State to tax or assess property twice for the same purpose, we know of no provision in the Federal Constitution which forbids this, or which forbids unequal taxation by the States. . . .

It is also said that part of the property of plaintiff which was assessed is not benefited by the improvement. This is a matter of detail with which this court cannot interfere, if it were clearly so. . . .

And lastly, and most strongly, it is urged that the court rendered a personal judgment against the owner for the amount of the tax, while it also made it a charge upon the land. It is urged with force, . . . that while for such improvements as this a part, or even the whole of a man's property connected with the improvement may be taken, no personal liability can be imposed on him in regard to it. If this were a proposition coming before us sitting in a state court, or, perhaps, in a circuit court of the United States, we might be called upon to decide it; but we are unable to see that any of the provisions of the Federal Constitution authorizes us to reverse the judgment of a state court on that question. It is not one which is involved in the phrase "due process of law," and none other is called to our attention in the present case. . . .

MR. JUSTICE BRADLEY. In the conclusion and general tenor of the opinion just read, I concur. But I think it narrows the scope of inquiry as to what is due process of law more than it should do.

It seems to me that private property may be taken by a State without due process of law in other ways than by mere direct enactment, or the want of a judicial proceeding. . . . The exceptions noted imply that the nature and cause of the taking are proper to be considered. . . . I think,

therefore, we are entitled, under the Fourteenth Amendment, not only to see that there is some process of law, but "due process of law," provided by the state law when a citizen is deprived of his property; and that, in judging what is "due process of law," respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or none of these; and if found to be suitable or admissible in this special case, it will be adjudged to be "due process of law;" but if found to be arbitrary, oppressive, and unjust, it may be declared to be not "due process of law." Such an examination may be made without interfering with that large discretion which every legislative power has of making wide modifications in the forms of procedure in each case, according as the laws, habits, customs, and preferences of the people of the particular State may require.

CHICAGO, MILWAUKEE & ST. PAUL RY. CO. *v.* MINNESOTA.

Supreme Court of the United States. 1890.

134 U.S. 418.

For the text of the opinion see Chapter 3, section, The Scope of Judicial Review. The Court recedes in this case from the position taken in *Munn v. Illinois*. In the latter case the Court had accepted as final, and therefore as reasonable, the State's determination of rates (rentals) for the use of certain warehouses. In the instant case the Court will not do so. The Court now holds that the question whether a rate fixed by a legislature or its administrative agency provides a reasonable return—that is, a fair return—is a judicial question. The Court holds, further, that failure by the legislature to allow an appeal to the courts on this question is a deprivation of property without due process of law.

The facts which the Court regarded as determining its decision were these:

1. The statute in question authorized a commission to alter railroad rates whenever the commission found them to be unequal or unreasonable.
2. The commission's finding was compulsory on the railroad affected. Three steps were provided by which the new rates should go into force: (a) the commission must notify the road of the change; (b) if the road refused to adopt the new rates within ten days after notification, the rates were to be published as the lawful rates; and (c) the commission might then apply to a state court for a writ of *mandamus* to compel obedience by the railroad.
3. The Supreme Court of Minnesota construed the statute to mean that the rates published by the commission were not intended to be only recommendations, but were to be final and conclusive as to what rates were equal

and reasonable. In other words, the law provided no proceedings by which an inquiry could be had into the equality or reasonableness of the charges. Thus the only issue which could be before the court in the *mandamus* proceedings was the failure (a fact) of the railroad to obey the order of the commission.

The case should be reread with this restatement of the facts in order to apply it to the present subject.

This case marks in the field of rate-making the formal adoption by the Supreme Court of the view expressed by Mr. Justice Bradley in his concurring opinion in *Davidson v. New Orleans*, namely, that the Court should weigh the factor of arbitrariness as an essential element in the disposition of property by due process. The Court said:

"The question of the reasonableness of a rate of charge for transportation by a railroad company, involving, as it does, the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law, and in violation of the Constitution of the United States. . . ." 134 U.S. 418, 458.

Since the case, also, the Court has broadly asserted the necessity for the judicial review of rate-making orders, whether issuing from a legislature or from a commission, *Wadley Southern Ry. Co. v. Georgia*, 235 U.S. 651, though in *Budd v. New York*, 143 U.S. 517, it had seemed to exclude rates made by a legislature from its investigation.

ALLGEYER v. LOUISIANA.

Supreme Court of the United States. 1897.

165 U.S. 578.

[In contravention of a Louisiana law prohibiting the making of contracts of insurance outside the jurisdiction of the State, Allgeyer & Co. took out a marine insurance policy with a New York insurance company which did no business in Louisiana. The policy was issued in New York and the premium paid there. According to the terms of the policy, the firm notified the insurance company of a shipment of cotton within the provisions of the policy, and mailed the premium therefor from New Orleans to New York, to cover the shipment of the cotton.]

MR. JUSTICE PECKHAM delivered the opinion of the court. . . .

In this case the only act which it is claimed was a violation of the statute in question consisted in sending the letter through the mail notifying the company of the property to be covered by the policy already delivered. We have, then, a contract which it is conceded was made outside and beyond the limits of the jurisdiction of the State of Louisiana, being made and to be performed within the State of New York, where the premiums were to be paid, and losses, if any, adjusted. The letter of notification did not constitute a contract made or entered into within the State of Louisiana. It was but the performance of an act rendered necessary by the provisions of the contract already made between the parties outside of the State. It was a mere notification that the contract already in existence would attach to that particular property. In any event, the contract was made in New York, outside of the jurisdiction of Louisiana, even though the policy was not to attach to the particular property until the notification was sent.

It is natural that the state court should have remarked that there is in this "statute an apparent interference with the liberty of defendants in restricting their rights to place insurance on property of their own whenever and in what company they desired." Such interference is not only apparent, but it is real, and we do not think that it is justified for the purpose of upholding what the State says is its policy with regard to foreign insurance companies which had not complied with the laws of the State for doing business within its limits. In this case the company did no business within the State, and the contracts were not therein made.

The supreme court of Louisiana says that the act of writing within that State the letter of notification was an act therein done to effect an insurance on property then in the State, in a marine insurance company which had not complied with its laws, and such act was therefore prohibited by the statute. As so construed, we think the statute is a violation of the fourteenth amendment of the federal Constitution, in that it deprives the defendants of their liberty without due process of law. The statute which forbids such act does not become due process of law, because it is inconsistent with the provisions of the Constitution of the Union. The "liberty" mentioned in that amendment means, not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned.

It was said by Mr. Justice Bradley, in *Butchers' Union Slaughter-*

House Co. v. Crescent City Live-Stock Landing Co., 111 U.S. 746, at page 762, . . . in the course of his concurring opinion in that case, that "the right to follow any of the common occupations of life is an inalienable right. It was formulated as such under the phrase 'pursuit of happiness' in the Declaration of Independence, which commenced with the fundamental proposition that 'all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness.' This right is a large ingredient in the civil liberty of the citizen." Again, on page 764 of 111 U.S., . . . the learned justice said: "I hold that the liberty of pursuit—the right to follow any of the ordinary callings of life—is one of the privileges of a citizen of the United States." And again, on page 765 of 111 U.S., . . . : "But if it does not abridge the privileges and immunities of a citizen of the United States to prohibit him from pursuing his chosen calling, and giving to others the exclusive right of pursuing it, it certainly does deprive him (to a certain extent) of his liberty; for it takes from him the freedom of adopting and following the pursuit which he prefers, which, as already intimated, is a material part of the liberty of the citizen." It is true that these remarks were made in regard to questions of monopoly, but they well describe the rights which are covered by the word "liberty," as contained in the fourteenth amendment.

Again, in *Powell v. Pennsylvania*, 127 U.S. 678, . . . Mr. Justice Harlan, in stating the opinion of the court, said: "The main proposition advanced by the defendant is that his enjoyment upon terms of equality with all others in similar circumstances of the privilege of pursuing an ordinary calling or trade, and of acquiring, holding, and selling property, is an essential part of his rights of liberty and property, as guaranteed by the fourteenth amendment. The court assents to this general proposition as embodying a sound principle of constitutional law." It was there held, however, that the legislation under consideration in that case did not violate any of the constitutional rights of the plaintiff in error.

The foregoing extracts have been made for the purpose of showing what general definitions have been given in regard to the meaning of the word "liberty" as used in the amendment, but we do not intend to hold that in no such case can the State exercise its police power. When and how far such power may be legitimately exercised with regard to these subjects must be left for determination to each case as it arises. . . .

In the privilege of pursuing an ordinary calling or trade, and of acquiring, holding, and selling property, must be embraced the right to make all proper contracts in relation thereto; and although it may be conceded that this right to contract in relation to persons or property or to do business within the jurisdiction of the State may be regulated,

and sometimes prohibited, when the contracts or business conflict with the policy of the State as contained in its statutes, yet the power does not and cannot extend to prohibiting a citizen from making contracts of the nature involved in this case outside of the limits and jurisdiction of the State, and which are also to be performed outside of such jurisdiction; nor can the State legally prohibit its citizens from doing such an act as writing this letter of notification, even though the property which is the subject of the insurance may at the time when such insurance attaches be within the limits of the State. The mere fact that a citizen may be within the limits of a particular State does not prevent his making a contract outside its limits while he himself remains within it. . . . The giving of the notice is a mere collateral matter. It is not the contract itself, but is an act performed pursuant to a valid contract. . . .

MEYER *v.* NEBRASKA.

Supreme Court of the United States. 1923.
262 U.S. 390.

By the Act of April 9, 1919, the legislature of Nebraska prohibited the teaching of any other language than English in the first eight grades of the secondary schools. Meyer was convicted of teaching German in Zion Parochial School to a child who had not passed the eighth grade.

MR. JUSTICE McREYNOLDS delivered the opinion of the court.

The problem for our determination is whether the statute . . . unreasonably infringes the liberty guaranteed to the plaintiff in error by the Fourteenth Amendment. . . .

While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. . . . The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect. Determination by the leg-

islature of what constitutes proper exercise of police power is not final or conclusive but is subject to revision by the courts. *Lawton v. Steel*, 152 U.S. 133, 137.

The American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted. . . . Corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life; and nearly all the States, including Nebraska, enforce this obligation by compulsory laws.

Practically, education of the young is only possible in schools conducted by especially qualified persons who devote themselves thereto. The calling has always been regarded as useful and honorable, essential, indeed, to the public welfare. Mere knowledge of the German language cannot reasonably be regarded as harmful. Heretofore it has been commonly looked upon as helpful and desirable. Plaintiff in error taught this language in school as part of his occupation. His right thus to teach and the right of parents to engage him so to instruct their children, we think, are within the liberty of the Amendment. . . .

It is said that the purpose of the legislation was to promote civic development by inhibiting training and education of the immature in foreign tongues and ideals before they could learn English and acquire American ideals. . . . It is also affirmed that the foreign born population is very large, that certain communities commonly use foreign words, follow foreign leaders, move in a foreign atmosphere, and that the children are thereby hindered from becoming citizens of the most useful type and the public safety is imperiled.

That the State may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear; but the individual has certain fundamental rights which must be respected. . . .

The power of the State to compel attendance at some school and to make reasonable regulations for all schools, including a requirement that they shall give instruction in English, is not questioned. Nor has challenge been made of the State's power to prescribe a curriculum for institutions which it supports. . . . We are constrained to conclude that the statute as applied is arbitrary and without reasonable relation to any end within the competency of the State. . . .

MR. JUSTICE HOLMES, dissenting:

We all agree, I take it, that it is desirable that all citizens of the United States should speak a common tongue, and therefore that the end aimed at by the statute is a lawful and proper one. The only question is whether the means adopted deprive teachers of the liberty secured

to them by the Fourteenth Amendment. It is with hesitation and unwillingness that I differ from my brethren with regard to a law like this but I cannot bring my mind to believe that in some circumstances, and circumstances existing it is said in Nebraska, the statute might not be regarded as a reasonable or even necessary method of reaching the desired result. The part of the act with which we are concerned deals with the teaching of young children. Youth is the time when familiarity with a language is established and if there are sections in the State where a child would hear only Polish or French or German spoken at home I am not prepared to say that it is unreasonable to provide that in his early years he shall hear and speak only English at school. But if it is reasonable it is not an undue restriction of the liberty either of teacher or scholar. No one would doubt that a teacher might be forbidden to teach many things, and the only criterion of his liberty under the Constitution that I can think of is "whether, considering the end in view, the statute passes the bounds of reason and assumes the character of a merely arbitrary fiat." *Purity Extract & Tonic Co. v. Lynch*, 226 U.S. 192, 204; *Hebe Co. v. Shaw*, 248 U.S. 297, 303; *Jacob Ruppert v. Caffey*, 251 U.S. 264. I think I appreciate the objection to the law but it appears to me to present a question upon which men reasonably might differ and therefore I am unable to say that the Constitution of the United States prevents the experiment being tried. . . .

MR. JUSTICE SUTHERLAND concurs in this opinion.

NOTE ON THE HOLMES DISSENT IN MEYERS *v.* NEBRASKA

The Holmes dissent in the *Meyers* case may come as a shock to those students who are familiar with the great Justice's reputation for liberalism in the interpretation of the Constitution. He seems to have set his face against one of the most precious of the attributes of the democratic life. He seems, moreover, to have used his extraordinary felicity of expression to attempt to undermine a historic constitutional principle.

The dissent, however, is in complete harmony with his philosophy. In the case of the *Noble State Bank v. Haskell*, which was decided twelve years before *Meyers v. Nebraska*, and which is given in the opening section of the cases in the next chapter, Holmes had defined the police power as extending to whatever is "held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare." He consistently supplemented this definition by a refusal to substitute the judicial judgment of policy for that of the legislature. The application of such a test to the Nebraskan statute must result in sustaining it. His celebrated dissent in *Lochner v. New York*,

which also appears in the next chapter, is the classic statement of this attitude. In that case, too, he would sustain a law which a majority of the Court struck down. The difference between the two cases is not a difference in philosophy, but a difference in the type of law under review. If one regards legislation of the Nebraskan type as oppressive and legislation of the New York type as productive of social well-being, then it is easy to slip into the opinion that a liberal judge should oppose the first and support the second. But to do that is to make the Court a monitor of legislative morality.

On this point Holmes was far ahead of his time. What was involved was a shift of view, as it were, from the individual equipped with his stock of inherent and inalienable rights to society with its imperative demands on his service. It was not until 1937 that Mr. Chief Justice Hughes, speaking for the Court in *West Coast Hotel v. Parrish*, observed: "The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation the Constitution does not recognize an absolute and uncontrollable liberty. . . . But the liberty safeguarded is liberty in a social organization which requires the protection of law." . . . This case is given later in the chapter on the New Deal. The Chief Justice's definition of liberty was the product of the acute economic depression of the thirties; and it was facilitated by the experience which the Supreme Court had undergone with an intransigent President and Congress. The political arms of the federal government were backed by just that quality of public opinion which Holmes had evoked in the *Noble State Bank* case. The Hughes definition was, so to speak, wrung from him. The Holmes dissent in the *Meyers* case was, in contrast, the work of a legal philosophy detached from the influence of emergent needs. Nevertheless, with this qualification, the far-sighted character of his view remains. He was still aware more than most of his colleagues that individuals were bound increasingly to lose their autonomy as their "social organization" developed in intricacy and complexity.

During this period Mr. Justice Brandeis was the Holmes partner in dissent in support of the legislative regulation of traditionally private businesses. After Mr. Justice Stone's appointment in 1925, he joined them. But in the *Meyers* case Brandeis finds himself with the majority. Several reasons may be hazarded for this alignment. Brandeis relied primarily upon a factual demonstration of public necessity in order to uphold governmental interference with private callings. No such demonstration was offered the Court here. He also moved away from the exceptional unless it could be clearly called an emergency; he preferred to seek authority in common experience. He was prone to examine other jurisdictional

units to discover whether the same problem existed for them and whether they agreed on a general method for handling it. This technique is exemplified in *Adams v. Tanner* in the chapter following. The *Meyers* case did not offer him the opportunity to make use of his methods. On the whole, the Brandeis outlook was dominated by a deep distrust of powerful special interest groups and by a corresponding championship of the little fellow.

Mr. Justice Sutherland also left his wing of the Court when he concurred with Holmes. He, with Van Devanter, McReynolds and Butler, composed the famous quadrumvirate which confronted the New Deal so resolutely. Butler had just been appointed (in 1922), so they were all sitting in the *Meyers* case. Sutherland spoke for the Court in the great minimum wage case, *Adkins v. Children's Hospital*. He had the other three with him there. They were essentially individualists, as Brandeis was; like him also, they believed in the efficacy of the competitive system and the reality of the economic struggle. Unlike him, however, they accepted the modern corporation—Big Business—as an integral part of the industrialization of the country. They were more concerned with restraining and guiding it than they were with disintegrating it. They were more apt than was Brandeis to let the fortunes of war decide the issue. Whereas Brandeis was eager to throw the Court on the side of the weaker participants in the industrial combat, Sutherland and his group preferred to maintain traditional rules inviolate. It was this attitude of simply enforcing the accepted rules that made them resent the accusation that their concept of the judicial function was legislative rather than judicial. In so far as there is a clue to Sutherland's crossing the line to join Holmes in the *Meyers* case, it is perhaps to be found in his dissent to the *West Coast Hotel* decision. Sutherland there shows himself sensitive to the criticism that the Court substitutes its own judgment for that of the legislature when it invalidates a law which invades the field of social control. He seems conscientiously open to the influence of a reasoned difference of opinion; he is willing to be persuaded. But if he can not be convinced, he will not yield; to yield is to abdicate reason. So far as he was under the necessity of casting a vote in the *Meyers* case, this reasoned difference was present. He could defer to the legislative judgment in this case because it seemed reasonable to him, and he could do it by joining Holmes. The combination of Holmes and Sutherland, then, is really fortuitous. Holmes indicated in his dissent that he did not agree with the legislature of Nebraska. This, however, was dictum and did not bind Sutherland.

SOUTHERN RAILWAY CO. v. VIRGINIA.

Supreme Court of the United States. 1933.
290 U.S. 190.

MR. JUSTICE McREYNOLDS delivered the opinion of the Court.

This appeal questions the validity of Ch. 62, Acts General Assembly of Virginia, 1930. . . .

Purporting to proceed under the challenged chapter, the Highway Commissioner, without prior notice, advised appellant that in his opinion public safety and convenience required elimination of the grade crossing near Antlers; also, he directed construction there of an overhead passage according to accompanying plans and specifications. Replying, the Company questioned the Commissioner's conclusion upon the facts, denied the validity of the Act, and refused to undertake the work. . . . The Commission . . . directed the Railway to construct the overhead. The Supreme Court . . . approved this action. . . .

As construed and applied, we think the statute conflicts with the XIVth Amendment:

Certainly, to require abolition of an established grade crossing and the outlay of money necessary to construct an overhead would take the railway's property in a very real sense. This seems plain enough both upon reason and authority. . . .

If we assume that by proper legislation a State may impose upon railways the duty of eliminating grade crossings, when deemed necessary for public safety and convenience, the question here is whether the challenged statute meets the requirements of due process of law. Undoubtedly, it attempts to give an administrative officer power to make final determination in respect of facts—the character of a crossing and what is necessary for the public safety and convenience—without notice, without hearing, without evidence; and upon this *ex parte* finding, not subject to general review, to ordain that expenditures shall be made for erecting a new structure. The thing authorized is no mere police regulation.

In *Interstate Commerce Comm'n v. Louisville & N. R. Co.*, 227 U.S. 88, 91, replying to the claim that a Commission's order made without substantial supporting evidence was conclusive, this Court declared:

"A finding without evidence is arbitrary and baseless. . . . Such authority, however beneficently exercised in one case, could be injuriously exerted in another; is inconsistent with rational justice, and comes

under the Constitution's condemnation of all arbitrary exercise of power. . . ."

Chicago, M. & St. P. Ry Co. v. Minnesota, 134 U. S. 418, 457, 458, involved an act of the Minnesota legislature, which permitted the commission finally to fix railway rates without notice. It was challenged because of conflict with the due process clause. This Court said:

"It deprives the company of its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefor, as an absolute finality, the action of a railroad commission which, in view of the powers conceded to it by the state court, cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice. . . . No hearing is provided for, no summons or notice to the company before the commission has found what it is to find and declared what it is to declare, no opportunity provided for the company to introduce witnesses before the commission, in fact, nothing which has the semblance of due process of law;

"The question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law. . . ."

The claim that the questioned statute was enacted under the police power of the State, and, therefore, is not subject to the standards applicable to legislation under other powers, conflicts with the firmly established rule that every state power is limited by the inhibitions of the XIVth Amendment. . . .

Counsel submit that the Legislature, without giving notice or opportunity to be heard, by direct order might have required elimination of the crossing. Consequently, they conclude the same end may be accomplished in any manner which it deems advisable, without violating the Federal Constitution. But if we assume that a state legislature may determine what public welfare demands and by direct command require a railway to act accordingly, it by no means follows that an administrative officer may be empowered, without notice or hearing, to act with finality upon his own opinion and ordain the taking of private property. There is an obvious difference between legislative determination and the finding of an administrative official not supported by evidence. In theory, at

least, the legislature acts upon adequate knowledge after full consideration and through members who represent the entire public. . . .

Considering the decisions here, it is clear that no such authority as that claimed for the Commissioner could be entrusted to an administrative office or body under the power to tax, to impose assessments for benefits, to regulate common carriers, to establish drainage districts, or to regulate business. . . . Appellee makes no claim to the contrary. He affirms, however, that under the police power the legislature could rightly grant the challenged authority. But, as pointed out above, this is subject to the inhibitions of the XIVth Amendment, and we think the suggested distinction between it and other powers of the State is unsound.

This Court has often recognized the power of a State, acting through an executive officer or body, to order the removal of grade crossings; but in all these cases there was the right to a hearing and review by some court. . . .

After affirming appellant's obligation to comply with the Commissioner's order, the court below said: "The railroad is not without remedy. Should the power vested in the Highway Commissioner be arbitrarily exercised, equity's long arm will stay his hand." But, by sanctioning the order directing the Railway to proceed, it, in effect, approved action taken without hearing, without evidence, without opportunity to know the basis therefor. This was to rule that such action was not necessarily "arbitrary." There is nothing to indicate what that court would deem arbitrary action or how this could be established in the absence of evidence or hearing. In circumstances like those here disclosed no contestant could have fair opportunity for relief in a court of equity. There would be nothing to show the grounds upon which the Commissioner based his conclusion. He alone would be cognizant of the mental processes which begot his urgent opinion.

The infirmities of the enactment are not relieved by an indefinite right of review in respect of some action spoken of as arbitrary. Before its property can be taken under the edict of an administrative officer the appellant is entitled to a fair hearing upon the fundamental facts. This has not been accorded. . . .

THE CHIEF JUSTICE, MR. JUSTICE STONE and MR. JUSTICE CARDOZO dissent upon the ground that there has been a lawful delegation to the State Highway Commissioner of the power to declare the need for the abatement of a nuisance . . . ; that this power may be exercised without notice or hearing . . . provided adequate opportunity is afforded for review . . . ; and that such opportunity has been given by the statutes of Virginia as construed by its highest court.

CHAPTER V

The Police Power of the States

JUDICIAL STATECRAFT

The definition of the police power on which the states of the Union were, so to say, brought up, was given by Chief Justice Taney:

"They [the police powers] are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions. And whether a State passes a quarantine law or a law to punish offenses, or to establish courts of justice, or requiring certain instruments to be recorded, or to regulate commerce within its own limits, in every case it exercises the same power; that is to say, the power of sovereignty, the power to govern men and things within the limits of its dominion." *The License Cases*, 5 How. 504, 584 (1847).

This definition has been clipped since Taney's time by the limitation of the specific objectives to attain which the judiciary will sustain the exertion of power, and by the circumscription of state sovereignty by the notion of due process. When Taney was writing, the constitutional conflict was between the construction of the powers granted to the federal government and the powers held to be reserved to the states. Since the turn of the century, the opposition has been between the rights of society as against those held to be vested in the individual. In 1922, Charles Warren thus defined the police power:

"The police power of a state, so far as the Federal Constitution is concerned, ultimately means that degree of interference with individual freedom of action or with the use of private property in the interest of the public welfare, which the judiciary considers not to be arbitrary, or not to be unduly violative of national rights in commerce between the states, at any given time and in the light of prevailing conditions." *The Supreme Court in United States History*, *op. cit.*, i, 462.

So the courts will scrutinize the undefined goals of the police power—the safety, the health, the morals, and the welfare of the people—as well as the law which reaches out to protect them. By the nineteen-twenties it had come to pass that the judicial power, and not the legislative, ruled whether these police objectives needed the shelter of the power of the state. It became a canon of interpretation that a power otherwise constitutional might not be exerted for an end held by the courts to be unconstitutional.

It is worth pausing in the analysis of the police power to observe how this principle was reached. It was announced for the federal Supreme Court by Mr. Justice Peckham in 1905, during the course of his opinion in the notorious case of *Lochner v. New York*. The Court had a long record, as will appear later, of sustaining a broad range of activity within the scope of the police power, and had even sanctioned that particular exertion of it, the limitation of hours of labor in certain occupations, which was held bad in the *Lochner* case. The *Munn* case had been thought from the date of its decision down to the year in question to represent the considered view of the Court on the scope of the police power and upon the attitude of the Court to the judicial supervision of legislative discretion in the protection of the public welfare. The reasoning of the Court in *Barbier v. Connolly*, decided in 1885, and in *Holden v. Hardy*, decided in 1898, had been regarded as clearing the field of judicial obstruction of legislation regulating the hours of labor where working-time might be a factor in the maintenance of the health of the workman. The over-all principle in these cases had been that the Fourteenth Amendment was not intended to restrict the power of the states to promote the health of their citizenry. *Barbier v. Connolly* was decided in the year of *In re Peter Jacobs*. The opinions of the Court, therefore, contained nothing except a few guarded phrases to presage the reversal of attitude revealed in the majority opinion in *Lochner v. New York*. These cases are collected in the present chapter.

It is worth appreciating that the doctrine of the Court seemed so clear that the qualifications to it appeared to be only formal. They had to do with the possible distinction between hazardous and innocuous industries, and, further, with the consequences of the differences in physical structure between men and women. But the implications latent in such definitions were not the material out of which the new principle was fashioned: the principle that constitutional means may not be used to attain an unconstitutional end. The definitions themselves were hardly more than intellectual instruments in the jurisprudence of the Court, useful for outlining the confines of a decision. The bases of this maxim are to be discovered elsewhere.

John Marshall had prefaced his famous exposition of the necessary and proper clause¹ by the proviso, "Let the end be legitimate—"; but he had refrained from laying down a rule which would state the authority which could pronounce upon such legitimacy. The question went, as it were, by default unanswered. The interpretations of the due process

¹ "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional." *McCulloch v. Maryland*, 4 Wheat. 316 (1819).

clause which prevailed for the first hundred years in the life of the Supreme Court, and which went unchallenged for the first three-quarters of that time, left the problem quiescent. It was said in the preceding chapter that this clause went through three stages of growth. It was in the last of these phases that a place was found for the judicial supervision of the legislative judgment.

The place was found, but not occupied; for still the bridge between the means and the end had to be constructed. Fairness of means had to be united with fairness of objective in such a way that the judiciary would have to take cognizance of the latter in order to construe the former. This difficult and rather subtle work was accomplished by the elaboration of the word "liberty" in the due process clause.

The due process clause, it will be recalled, contains three terms: life, liberty, and property. No state shall deprive any person of one of these three without due process of law. The first step was to transfer the concept of property to the word "liberty." Liberty of property, and therefore liberty of property rights, was thus brought within the meaning of the guaranty. The next step was to include therein the field of contracts. Contracts had long been held to create or to incorporate property rights within the meaning of the constitutional prohibition against violating the obligation of contracts. It was not too difficult to broaden this reasoning sufficiently to bring liberty of contract within the meaning of due process, and thus to give it the protection of the Fourteenth Amendment.

The decision in the *Lochner* case is generally recognized to rest on a crudely reasoned opinion. This fault, however, is useful for present purposes, for the judicial position is left quite bare of clothing. The New York law limiting the hours of work for bakers is held bad on two grounds. The first one is this:

There is, in our judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law to safeguard the public health. . . .

We think that there can be no fair doubt that the trade of a baker is not an unhealthy one to that degree which would authorize the legislature to interfere with the right of free contract. . . .

Mr. Justice Peckham argues that the health law is unconstitutional because it is neither necessary nor appropriate. This maladaptation, however, exists, not because of an intrinsic fault in the law, but because the end which it serves does not warrant this or any other law. The preservation of the public health is admittedly a constitutional end. Furthermore, the means chosen by the legislature to fulfil the end is obviously plainly adapted to doing so, and had been held constitutional in decided cases which are not now reversed. Why then should these means

be unconstitutional in the present instance? The answer is that the trade of a baker does not need protection. It therefore does not need protection by the means chosen or by any other means. The key word here is *authorize*. But there is, as has been said, a second answer, too:

It is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality passed from other motives. We are justified in saying so when, from the character of the law and the subject upon which it legislates, it is apparent that the public health or welfare bears but the most remote relation to the law . . . whether it is or is not repugnant to the Constitution of the United States must be determined from the natural effect of such statutes when put into operation, and not from their proclaimed purpose. . . .

This answer is like the first one in that (a) it maintains that the connection between the means and the end is remote, and (b) it frankly sets a judicial denial over against a legislative affirmation. So much is common ground between the two answers. The latter one, however, proceeds beyond this point. Instead of regarding the whole episode as an instance of mistaken judgment on the part of the legislature, as it might have done within the bounds of the first answer, the Court questions the good faith of the legislature. In the second answer, the legislature's judgment is not poor, but perverted. The Court has passed from considering the quality of the judgment to considering the motivation of the judgment. Judicial review can, of course, advance no further. Mr. Justice Peckham's argument has other interesting aspects, but they need have no comment for they are not germane to the present topic.

One more observation should be made, however, for its significance with respect to succeeding cases. It will be recalled that the doctrine of procedural due process did not take into account a situation where the forms of due process were unimpeachable, but where the result was thought arbitrary. The doctrine of the substance of due process satisfied the need for meeting such a contingency. It might seem at first glance that the New York hours-of-baking law presented just the kind of opportunity which the doctrine of substantial due process was intended to satisfy. The *Lochner* case, however, is not a due process case. It is a case placing a limit to the police power. The line of demarcation is drawn, not with reference to due process, but with reference to the relationship between the end and the means. The test in this case is not whether substantial justice is done by the challenged legislation, but whether the proclaimed objective of this legislation actually exists. The distinction is subtle, but none the less workable. At the most, the case becomes a due process case, as Mr. Justice Holmes said later in another connection, by a species of "radiation." The correct way of putting the

question in such cases is not, Has due process been violated?, but, Is the challenged legislation a proper exercise of the police power of the state? Is the end sought an appropriate one?

This is the way in which the general question was put in *Bunting v. Oregon*. This case returned the Court to the line of decisions of which *Holden v. Hardy* is the leading case. In it the Supreme Court sustained an Oregon hours-of-labor law of much greater sweep than that disallowed by *Lochner v. New York*. The *Lochner* case was not mentioned. The Court, speaking through Mr. Justice McKenna, did nevertheless have this to say:

"If, therefore, we take the law at its word there can be no doubt of its purpose. . . . Of course, mere declaration cannot give character to a law nor turn illegal into legal operation, and when such attempt is palpable this court necessarily has the power of review."

After noting that plaintiff attacks the law on just this ground, the justice observes,

"To assent to this is to ascribe to the legislation such improvidence of expression as to intend one thing and effect another, or artfulness of expression to disguise illegal purpose. We are reluctant to do either. . . ."

Thus the *Lochner* decision was left to stand, but without controlling authority. When a decision is left in this ambiguous status, it is said to have been overruled *sub silentio*. The guess may be ventured that the case was preserved for its importance to the power of review. The extent of that power as announced in *Lochner v. New York* is affirmed again in the *Bunting* case, even though the decisions in the two cases go opposite ways.

It will be remembered that the common ground between the two answers given in the former case was the proposition that judicial determination of the degree of relationship between end and means is conclusive on the legislature. The Court has consistently used this power of review in a very wide variety of cases concerned with the exercise of the police power. The proposition is at the bottom of the doctrine of the public interest, the second of the subdivisions of the cases to come. That doctrine is capable of, and has received, separate statement. But the Supreme Court will decide for itself whether or not a business is so affected with a public interest as to be subject to state regulation. It will appraise, also, the public's dependence upon a business (*New State Ice Co. v. Liebmann*); the moral turpitude which may characterize business conduct without inducing state control (*Adams v. Tanner*), and the place which theatres fill in the life of the public (*Tyson & Bro. v. Banton*). In other words, when the Court must pass on the constitutionality of a specific regulatory act, before it can rule that the act is reasonable and plainly adapted to its end, it must determine what the end is and then

determine whether that end is within the scope of the Constitution. This is the task which faces the Court by virtue of the synthetic doctrine of the *Lochner* and *Wolff Packing Co.* cases. To decide what the objective of the specific regulatory act is, the Court must look not at one end, but at two. It must look at the direct object of the regulation, which is the business itself. The question here is whether that business is so clothed with a public interest as to bring it within the regulatory power. Then the Court must look at the purpose of the regulation. Here the question is whether the regulation is in furtherance of the public welfare. Thus there is the direct end, the business, and the ultimate end, the public welfare.

The language of the cases is so vague that it obscures what the Court is actually doing. The ideology of the doctrine of business affected with a public interest glosses over the fact that there are two ends involved. It does so by directing attention to the immediate end, that is, to the business to be regulated. The problem before the Court seems to be to fix the category in which the business shall be placed. Once that is done, it will be clear whether or not the power to regulate it exists. If it does exist, then the Court can proceed to ascertain whether the particular regulation in question is constitutional. The process of adjudication seems simple, objective, and formal; and so it would be if the categories were self-determining. For some businesses, indeed, they are. Examples of automatic classification are the hotel business, the public utilities, the railroads. But the majority of businesses do not place themselves with relation to the public. Take, for instance, ice companies, or employment agencies, or places of amusement. Are they affected with a public interest? Are tourist camps public servants? In order to place such businesses as these, the doctrine of the public interest must have within it somewhere the controlling assumption that public interest exists when the service which the business does, and for which it charges payment, affects the public welfare. Whether or not the public welfare is affected, then, becomes a primary question. But some effect on the public may be taken for granted in the case of every business. Yet all businesses are not susceptible of government regulation. The scope of the doctrine does not reach so far. Public interest must have a certain intensity before government may step in. This requisite degree of intensity is presumed to be created by the degree to which the public welfare is affected. And the degree to which the public welfare is affected is a matter for the courts to determine. Consequently, by the nature of the doctrine, the courts must rule definitively upon matters of opinion. By this route the courts are led to scrutinize the purpose for which governmental regulation is laid down.

These comments may be made somewhat less general. The police

power in this class of cases is ordinarily exerted to accomplish one of two purposes: either to compel the business in question to conform to prescribed standards of service, or to fix by law (including the rulings of administrative agencies in this term) the maximum rates which may be charged for such services. These two purposes may sometimes be inter-related, but they are intrinsically distinct from each other. Now, if a legislature moves to accomplish either purpose, its act must be in order to promote the general welfare. To determine whether this prerequisite condition is met, the courts must decide for themselves a series of extra-constitutional questions: (a) Does the conduct of this business concern the general welfare, either in principle or in fact? (b) Does the way in which this business is managed injure the public welfare? Are the services which the business offers the public of so poor a quality that they abuse the interests of that part of the public which uses them? Are the rates charged for its services too high, either with reference to the service itself, or with reference to the expense to the public? To answer these problems is to scrutinize the ultimate purpose of the regulation of the business, as well as to classify the business itself. Only after the answers to these questions have been given in favor of the state will the courts proceed to examine the grounds upon which the validity of the enactment of the legislature is assailed.

The doctrine of business affected with a public interest dominated the jurisprudence of the Supreme Court until the time of the New Deal. Its abandonment then will be noted in its appropriate place. The observation may be made here that it crumbled finally because of the weight of its own involutions.

A line of cases in another field of the social welfare begins with *Muller v. Oregon*, in which the Supreme Court sustained a state law limiting the number of hours of work for women. The line may be traced down to *Radice v. New York*, which has succeeded it as the leading case. In the opinion in the *Muller* case, *Lockner v. New York* was distinguished on the ground that the legislation there held bad had covered the hours of work for men. As has been noted, *Bunting v. Oregon* later brought men within the protection of the state sufficiently to permit limitation of their work-day.

The Court refused, however, to validate statutory fixing of minimum wages. In 1923, in a sweeping opinion in the case of *Adkins v. Children's Hospital*, the Court shut out the states from the entire field of minimum wage legislation. During the same period, the Court declined to protect organized labor from discrimination against union men by employers of labor, by invalidating on broad grounds state legislation making it an offense to discharge an employee for belonging to a union. *Adair v. U.S.*, 208 U.S. 161 (1908); *Coppage v. Kansas*, 236 U.S. 1 (1915). The

Supreme Court had a stable conservative majority, and the point of view of this wing controlled constitutional law until 1936.

These cases reveal a doctrinal point of some interest: the concept of the business affected with a public character was not used to cover laws affecting the conditions of labor. This identification was not made until the Supreme Court of the New Deal made it in the labor cases of the late thirties. What the Court did, instead, was to place labor laws within the employer-employee relationship. This is a contractual one, of course. The controlling concept was, therefore, liberty of contract within the terms of the Fourteenth Amendment. The judicial view is all the more striking because the state legislatures professed to be acting in behalf of the general welfare no less when they attempted to regulate the hours and wages of labor than when they attempted to regulate the standards of business or the rates to be charged for the performance of service to the public.

The juridical explanation for this change of base is, that the exertion of the police power required in the labor cases brought that power into conflict with a specific clause of the federal Constitution. The federal Constitution is a limitation upon the police power whenever that power collides with one of the provisions of the Constitution. Failure of due process is an example of one such collision. The violation of the obligation of a contract is another. Interference directly with interstate commerce is still a third example. The first two have been analyzed in other connections. The last will be considered in detail in the chapter on interstate commerce. A few cases involving the commerce clause are, however, included in the present chapter because they illustrate this type of limitation. They are concerned with the scope of the police power, not with the scope of the commerce power. Such a case is that of *State Highway Department v. Barnwell*, where the police power is granted great latitude in regulating the types of vehicles using the highways so as to promote the safety of the traffic thereon. Another example is that of *Whitfield v. Ohio*, where the state is allowed to prohibit the entry of prison-made goods, because the conditions of their manufacture give them a competitive advantage over similar free goods. It will be seen at once that in each case the ostensible purpose of the challenged legislation is to promote the general welfare. The primary question here, however, is a question of power: the effect of a granted power (or of a surrendered power) upon the power reserved to the states and to the people. The problem for the Court is as much one of statecraft as it is of constitutional law. There are three considerations which certainly govern the judicial construction of an inhibiting clause in the Constitution: (1) The Constitution must not be assumed to be inimical to the public welfare; (2) Public need, however urgent, does not suspend the provi-

sions of the Constitution, although it may call into play powers latent there in normal situations; (3) The Court's whole policy toward the clause invoked—its interpretation of the clause through the whole of the record—must be respected. These considerations have often been expressed as maxims by members of the Court speaking for the majority. There is one other which is almost surely present: a dominant theory as to the extent to which government may curtail the rights of private property. Down to the last decade, that theory was the nineteenth century doctrine of economic *laissez faire*—the theory that the welfare of society is best furthered by the free competitive activity of the individuals which compose it. Mr. Justice Sutherland closes his opinion in *Adkins v. Children's Hospital* by stating his belief in this theory. This opinion can be read profitably with his dissent in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), a New Deal decision which reversed the *Children's Hospital* case and validated minimum wage legislation on the broadest grounds.

The refusal of the Supreme Court to sustain minimum wage laws after it had validated laws limiting the hours of labor has remained something of an enigma. To the dissenting minorities of the day it seemed that there was no difference in principle between restricting one's freedom to contract for working-time and restricting one's freedom to contract for payment for working-time. The prevailing majorities never succeeded in answering this objection. Indeed, they seem not to have made a serious attempt to do so. They chose, rather, the position that it is impossible to say what wage level is necessary to produce that standard of health which society has a right to require of its members. With such an orientation, the Court could hardly accept an argument which advocated the limitation of such a fundamental private right as that of free bargaining in order to launch an empirical program of social betterment. It is not clear, either, whose rights to free bargaining the Court was protecting. The interpretation of liberty of contract within the Fourteenth Amendment rested on the proposition that the employee possessed a bargaining status equal in power to that of the employer. In the wage cases, when the application of the clause permitted the employee to contract for low wages, the employer was, as a practical result, protected. But in the hours of labor cases, when the employee was forbidden to contract for more than ten hours of work, it would seem that *he* was being protected. But if he could exceed the ten-hour limit if the employer would pay him time and a half for overtime, then he was not being forbidden to overwork; he was being forbidden to overwork at the usual rate per hour. If working for more than ten hours a day was thought to be a menace to the health of the worker, then the theory providing for it at an increased wage would have to be that the

extra money could be used to safeguard the worker's health from this hazard. But the theory was not so stated. It was assumed that the increased wage scale was in the nature of a penalty imposed upon the employer to deter him from keeping his men at work more than the lawful time. To such divagations was the Court reduced.

There is a substantial similarity between the reasoning of the Court in the wage cases and that in *Lochner v. New York*. There is the same scope of review; the same denial of the validity of the ultimate objective; the same conclusion that the means is not related to the end; the same questioning of the motivation of the legislature.

The hostility of the Court to the legislative creation of a minimum wage level is a part of its broader antipathy to legislative price-fixing in general. The *Tyson & Bro.* case and *Ribnik v. McBride* fall with the wage cases in this broad field so far as the jurisprudence of the Court is concerned. They represent normal constitutional doctrine on the subject of price-fixing, and have become classics. The *Nebbia* case, decided early in the New Deal, put an end to this doctrine. It now is the leading case on the legitimacy of price-fixing. *Block v. Hirsh*, 256 U.S. 135 (1921), which appears in the chapter on the obligation of contracts clause, and which also sustains price-fixing, is the leading case on emergencies. The two cases are to be distinguished.

Because the police power of the states is a composite of unclassified sovereign powers, its extent is difficult of limitation. Its scope is unsympathetic to the marking of bounds. In general, it is found to be wanting under one of two conditions: either it transgresses a prohibition in the federal Constitution, or it collides with the federal power over interstate commerce. Transgression occurs when some exertion of the power thwarts liberty of contract, or produces a discrimination which causes the law to give protection unequally, or violates some privilege or immunity deemed to be sanctioned against governmental interference. The force of the guarantees inherent in these barriers to power may be felt either directly or through the medium of due process. Collision with the commerce power of the federal government results when the state interferes directly with congressional control of that commerce. The bare exertion of jurisdiction over interstate commerce is not, taken by itself, prohibited by the grant of power contained in the interstate commerce clause. State legislation which is directed to the accomplishment of a legitimate objective within the range of the police power may affect incidentally interstate commerce and not lose constitutionality on that ground.

The activity of the states within their reserved sovereignty is actually conditioned by the conceptual relation between the words of the Constitution and the scale of values cherished by a majority of the members

of the Supreme Court of the United States. Regulation is essentially a narrowing of individual action; it produces compulsory conduct; it is a restriction of independence. It inhibits one set of rights in order to give play to another set. One pursues one's calling for one's own benefit, as far as the law gives consent. Legislative readjustment of rights provokes protest from those whose rights are confined by the readjustment or are controlled by the admission of new and paramount rights which have inspired the regulation. Values are at stake. When the choice is made, the preference is clothed with a constitutional principle. The reach of the police power is thus conditioned by what it is that is reached for.

The classification of the police powers of a state is only approximately descriptive. For example, legislation controlling the sale of liquor may be designed to protect either the physical safety or the morals of the public, or it may be broadly in the interest of the general welfare. The taxing power may be used to raise revenue from the sale of liquor, while, at the same time, a measure of control is sought and obtained by the raising of the cost of the liquor either to the dealer or to the public. To this extent the state exerts its powers in a manner difficult to analyze in constitutional terms, for it may be that the state is using two powers to accomplish two ends which are themselves realized by the single act of purchasing liquor; or it may be that the state is exerting but one power—the taxing power—to attain an end which is within the scope of another power—the police power, by levying a tax so high as to discourage consumption of the article taxed, but not so high as to prevent revenue from being raised. Or it may be that the state will lay a prohibitive tax on an article thought to be objectionable, with the result that it is driven off the market. Where such a law is sustained, a police objective has been accomplished by the unconcealed use of the taxing power for other than revenue purposes.

In the field of rate regulation there is even more obscurity with regard to the source of the power used. There must be a conclusion that the services the charges for which are regulated are affected with a public interest, before the charges can be controlled. Then, if the business or service is more than intrastate, the question is raised whether the state is infringing on the commerce power granted to the federal government. The question may be complicated by considerations for the public welfare, so that there is doubt whether the state is exerting its own commerce power or its police power. Latitude may be present if the rate regulation affects a public utility which would be absent if the rate should be applied to the transportation of freight.

Furthermore, the fixing of the selling price of a necessary article of life, like milk; the fixing of the rent which may be charged for storage facilities for goods (*a*) shipped or (*b*) to be shipped in interstate com-

merce; the charges for transportation; the charges for the service of public utilities; and the fixing of a minimum level for wages, are all aspects of a power controlling the price of commodities purchased by the public or by individuals. The Supreme Court is constrained by its own definition of its functions to trace each exertion of this power to some specific constitutional source. And when this is done, its task is not over, for it must pursue the force of such legislation through a tangle of potential conceptual restraints which are thought to be implicit in the phrases of the federal Constitution.

BIBLIOGRAPHICAL NOTE

Concern here is with the record of the Supreme Court's policy toward state legislation in behalf of the social welfare, and with its regulation of business enterprise from the sides of both capital and labor. The best treatments of these subjects are those of Warren and Boudin in their works cited above. Warren's is the more narrative, Boudin's the more analytical.

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The Definition of the Police Power

BARBIER v. CONNOLLY.

Supreme Court of the United States. 1885.

113 U.S. 27.

[Error to the Superior Court of the city and county of San Francisco.]

MR. JUSTICE FIELD delivered the opinion of the court. . . .

In this case we can only consider whether the fourth section of the ordinance of the city and county of San Francisco is in conflict with the Constitution or laws of the United States. . . . Our jurisdiction is confined to a consideration of the federal question involved, which arises upon an alleged conflict of the fourth section in question with the first section of the Fourteenth Amendment of the Constitution of the United States. . . .

That fourth section, so far as it is involved in the case before the police judge, was simply a prohibition to carry on the washing and ironing of clothes in public laundries and wash-houses, within certain prescribed limits of the city and county, from ten o'clock at night until six o'clock in the morning of the following day. The prohibition against labor on Sunday is not involved. The provision is purely a police regulation within the competency of any municipality possessed of the ordinary powers belonging to such bodies. And it would be an extraordinary usurpation of the authority of a municipality, if a federal tribunal should undertake to supervise such regulations. It may be a necessary measure of precaution in a city composed largely of wooden buildings like San Francisco, that occupations, in which fires are constantly required, should cease after certain hours at night until the following morning; and of the necessity of such regulations the municipal bodies are the exclusive judges; at least any correction of their action in such matters can come only from State legislation or State tribunals. The same municipal authority which directs the cessation of labor must necessarily prescribe the limits within which it shall be enforced, as it does the limits in a city within which wooden buildings cannot be constructed. There is no invidious discrimination against any one within the prescribed limits by such regulations. There is none in the regulation under consideration. The specification of the limits within which the business cannot be carried on without the certificates of the health officer and Board of Fire

Wardens is merely a designation of the portion of the city in which the precautionary measures against fire and to secure proper drainage must be taken for the public health and safety. It is not legislation discriminating against any one. All persons engaged in the same business within it are treated alike; are subject to the same restrictions and are entitled to the same privileges under similar conditions.

The Fourteenth Amendment, in declaring that no State "shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses. But neither the amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having these objects in view, must often be had in certain districts, such as for draining marshes and irrigating arid plains. Special burdens are often necessary for general benefits—for supplying water, preventing fires, lighting districts, cleaning streets, opening parks, and many other objects. Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon any one, but to promote, with as little individual inconvenience as possible, the general good. Though, in many respects, necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it

affects alike all persons similarly situated, is not within the amendment. . . .

NOBLE STATE BANK *v.* HASKELL.*

Supreme Court of the United States. 1911.

219 U.S. 104.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a proceeding against the Governor of the State of Oklahoma and other officials who constitute the State Banking Board to prevent them from levying and collecting an assessment from the plaintiff under an act approved December 17, 1907. This act creates the Board and directs it to levy upon every bank existing under the laws of the State an assessment of one per cent of the bank's average daily deposits for the purpose of creating a Depositors' Guaranty Fund. . . . The purpose of the fund is shown by its name. It is to secure the full repayment of deposits. . . . A lien is reserved upon the assets of the failing bank to make good the sum thus taken from the fund. The plaintiff says that it is solvent and does not want the help of the Guaranty Fund, and that it cannot be called upon to contribute toward securing or paying the depositors in other banks consistently with Article I, # 10, and the Fourteenth Amendment of the Constitution of the United States. . . .

The reference to Article I, # 10, does not strengthen the plaintiff's bill. The only contract that it relies upon is its charter. That is subject to alteration or repeal, as usual, so that the obligation hardly could be said to be impaired by the act of 1907 before us, unless that statute deprives the plaintiff of liberty or property without due process of law. . . . Whether it does so or not is the only question in the case.

In answering that question we must be cautious about pressing the broad words of the Fourteenth Amendment to a drily logical extreme. Many laws which it would be vain to ask the court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of one or another of the great guarantees in the Bill of Rights. They more or less limit the liberty of the individual or they diminish property to a certain extent. We have few scientifically certain criteria of legislation, and as it often is difficult to mark the line where what is called the police power of the States is limited by the Constitution of the United States, judges should be slow to read into the latter a *nolumus mutare* as against the lawmaking power.

The substance of the plaintiff's argument is that the assessment takes private property for private use without compensation. And while we

should assume that the plaintiff would retain a reversionary interest in its contribution to the fund so as to be entitled to a return of what remained of it if the purpose were given up still there is no denying that by this law a portion of its property might be taken without return to pay debts of a failing rival in business. Nevertheless, notwithstanding the logical form of the objection, there are more powerful considerations on the other side. In the first place it is established by a series of cases than an ulterior public advantage may justify a comparatively insignificant taking of private property for what, in its immediate purpose, is a private use. *Clark v. Nash*, 198 U.S. 361, *Bacon v. Walker*, 204 U.S. 311. . . . And in the next, it would seem that there may be other cases beside the everyday one of taxation, in which the share of each party in the benefit of a scheme of mutual protection is sufficient compensation for the correlative burden that it is compelled to assume. See *Ohio Oil Co. v. Indiana*, 177 U.S. 190. . . . At least, if we have a case within the reasonable exercise of the police power as above explained, no more need be said.

It may be said in a general way that the police power extends to all the great public needs. *Camfield v. United States*, 167 U.S. 518. . . . It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare. Among matters of that sort probably few would doubt that both usage and preponderant opinion give their sanctions to enforcing the primary conditions of successful commerce. One of those conditions at the present time is the possibility of payment by checks drawn against bank deposits, to such an extent do checks replace currency in daily business. If then the legislature of the State thinks that the public welfare requires the measure under consideration, analogy and principle are in favor of the power to enact it. Even the primary object of the required assessment is not a private benefit as it was in the cases above cited of a ditch for irrigation or a railway to a mine, but it is to make the currency of checks secure, and by the same stroke to make safe the almost compulsory resort of depositors to banks as the only available means for keeping money on hand. The priority of claim given to depositors is incidental to the same object and is justified in the same way. The power to restrict liberty by fixing a minimum of capital required of those who would engage in banking is not denied. The power to restrict investments to securities regarded as relatively safe seems equally plain. It has been held, we do not doubt rightly, that inspections may be required and the cost thrown on the bank. . . . The power to compel, beforehand, cooperation, and thus, it is believed, to make a failure unlikely and a general panic almost impossible, must be recognized, if government is to do its proper work,

unless we can say that the means have no reasonable relation to the end. . . . So far is that from being the case that the device is a familiar one. It was adopted by some States the better part of a century ago, and seems never to have been questioned until now. . . .

It is asked whether the State could require all corporations or all grocers to help to guarantee each other's solvency, and where we are going to draw the line. But the last is a futile question, and we will answer the others when they arise. With regard to the police power, as elsewhere in the law, lines are pricked out by the gradual approach and contact of decisions on the opposing sides. . . . It will serve as a datum on this side, that in our opinion the statute before us is well within the State's constitutional power, while the use of the public credit on a large scale to help individuals in business has been held to be beyond the line. *Loan Association v. Topeka*, 20 Wall. 655. . . .

The question that we have decided is not much helped by propounding the further one, whether the right to engage in banking is or can be made a franchise. But as the latter question has some bearing on the former and as it will have to be considered in the following cases, if not here, we will dispose of it now. It is not answered by citing authorities for the existence of the right at common law. There are many things that a man might do at common law that the States may forbid. He might embezzle until a statute cut down his liberty. We cannot say that the public interests to which we have adverted, and others, are not sufficient to warrant the State in taking the whole business of banking under its control. On the contrary we are of opinion that it may go on from regulation to prohibition except upon such conditions as it may prescribe. In short, when the Oklahoma legislature declares by implication that free banking is a public danger, and that incorporation, inspection and the above-described cooperation are necessary safeguards, this court cannot say that it is wrong. . . .

Business Affected with a Public Interest

MUNN *v.* ILLINOIS

Supreme Court of the United States. 1876.

94 U.S. 113.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

The question to be determined in this case is whether the general assembly of Illinois can . . . fix by law the maximum of charges for the storage of grain in warehouses at Chicago and other places in the

State having not less than one hundred thousand inhabitants, "in which grain is stored in bulk, and in which the grain of different owners is mixed together. . . ."

It is claimed that the law is repugnant—

3. To that part of amendment 14 which ordains that no State shall "deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

We shall consider the last of these objections first.

Every statute is presumed to be constitutional. The courts ought not to declare one to be unconstitutional, unless it is clearly so. If there is doubt, the expressed will of the legislature should be sustained.

The Constitution contains no definition of the word "deprive," as used in the Fourteenth Amendment. To determine its signification, therefore, it is necessary to ascertain the effect which usage has given it, when employed in the same or a like connection.

While this provision of the amendment is new in the Constitution of the United States, as a limitation upon the powers of the States, it is old as a principle of civilized government. It is found in Magna Charta, and, in substance if not in form, in nearly or quite all the constitutions that have been from time to time adopted by the several States of the Union. By the Fifth Amendment, it was introduced into the Constitution of the United States as a limitation upon the powers of the national government, and by the Fourteenth, as a guaranty against any encroachment upon an acknowledged right of citizenship by the legislatures of the States.

When the people of the United States separated from Great Britain, they changed the form, but not the substance, of their government. They retained for the purposes of government all the powers of the British Parliament, and through their State constitutions, or other forms of social compact, undertook to give practical effect to such as they deemed necessary for the common good and the security of life and property. All the powers which they retained they committed to their respective States, unless in express terms or by implication reserved to themselves. Subsequently, when it was found necessary to establish a national government for national purposes, a part of the powers of the States and of the people of the States was granted to the United States. This grant operated as a further limitation upon the powers of the States, so that now the governments of the States possess all the powers of the Parliament of England, except such as have been delegated to the United States or reserved by the people. The reservations by the people are chosen in the prohibitions of the constitutions.

When one becomes a member of society, he necessarily parts with some rights or privileges which, as an individual not affected by his relations to others, he might retain. . . . This is the very essence of government, and has found expression in the maxim *sic utere tuo ut alienum non laedas*. From this source come the police powers, which, as was said by Mr. Chief Justice Taney in the *License Cases*, 5 How. 583, "are nothing more or less than the powers of government inherent in every sovereignty, . . . that is to say, . . . the power to govern men and things." Under these powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good. . . .

From this it is apparent that, down to the time of the adoption of the Fourteenth Amendment, it was not supposed that statutes regulating the use, or even the price of use, of private property necessarily deprived an owner of his property without due process of law. Under some circumstances they may, but not under all. . . .

This brings us to inquire as to the principles upon which this power of regulation rests, in order that we may determine what is within and what without its operative effect. Looking, then, to the common law, from whence came the right which the Constitution protects, we find that when private property is "affected with a public interest, it ceases to be *juris privati* only." This was said by Lord Chief Justice Hale more than two hundred years ago, in his treatise *De Portibus Maris*, 1 Harg. Law Tracts, 78, and has been accepted without objection as an essential element in the law of property ever since. Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control. . . .

. . . . It remains only to ascertain whether the warehouses of these plaintiffs in error, and the business which is carried on there, come within the operation of this principle.

For this purpose we accept as true the statements of fact contained in the elaborate brief of one of the counsel of plaintiffs in error. From these it appears that "the great producing region of the West and Northwest sends its grain by water and rail to Chicago, where the greater part of it is shipped by vessel for transportation to the seaboard by the Great Lakes, and some of it is forwarded by railway to the Eastern ports. . . .

Vessels, to some extent, are loaded in the Chicago harbor, and sailed through the St. Lawrence directly to Europe. . . . The quantity (of grain) received in Chicago has made it the greatest grain market in the world. This business has created a demand for means by which the immense quantity of grain can be handled or stored, and these have been found in grain warehouses, which are commonly called elevators. . . . In this way the trade in grain is carried on by the inhabitants of seven or eight of the great States of the West with four or five of the States lying on the sea-shore, and forms the largest part of inter-state commerce in these States. The grain warehouses . . . are located with the river harbor on one side and the railway tracks on the other; and the grain is run through them from car to vessel, or boat to car, as may be demanded in the course of business. It has been found impossible to preserve each owner's grain separate, and this has given rise to a system of inspection and grading, by which the grain of different owners is mixed, and receipts issued for the number of bushels which are negotiable, and redeemable in like kind, on demand. . . ."

In this connection it must also be borne in mind that, although in 1874 there were in Chicago fourteen warehouses adapted to this particular business, and owned by about thirty persons, nine business firms controlled them, and that the prices charged and received for storage were such "as have been from year to year agreed upon and established by the different elevators or warehouses in the city of Chicago." . . . Thus it is apparent that all the elevating facilities through which these vast productions "of seven or eight great States of the West" must pass on the way "to four or five of the States on the seashore" may be a "virtual" monopoly.

Under such circumstances it is difficult to see why, if the common carrier, or the miller, or the ferryman, or the inn keeper, or the wharfinger, or the baker, or the cartman, or the hackney-coachman, pursues a public employment and exercises "a sort of public office," these plaintiffs in error do not. . . . Their business most certainly "tends to a common charge, and is become a thing of public interest and use." . . . Certainly, if any business can be clothed "with a public interest, and cease to be *juris privati* only," this has been. It may not be made so by the operation of the Constitution of Illinois or this statute, but it is by the facts. . . .

Neither is it a matter of any moment that no precedent can be found for a statute precisely like this. It is conceded that the business is one of recent origin, that its growth has been rapid, and that it is already of great importance. And it must also be conceded that it is a business in which the whole public has a direct and positive interest. It presents, therefore, a case for the application of a long-known and well-established

principle in social science, and this statute simply extends the law so as to meet this new development of commercial progress. There is no attempt to compel these owners to grant the public an interest in their property, but to declare their obligations, if they use it in this particular manner.

It matters not in this case that these plaintiffs in error had built their warehouses and established their business before the regulations complained of were adopted. What they did was from the beginning subject to the power of the body politic to require them to conform to such regulations as might be established by the proper authorities for the common good. They entered upon their business and provided themselves with the means to carry it on subject to this condition. . . .

It is insisted, however, that the owner of property is entitled to a reasonable compensation for its use, even though it be clothed with a public interest, and that what is reasonable is a judicial and not a legislative question.

As has already been shown, the practice has been otherwise. In countries where the common law prevails, it has been customary from time immemorial for the legislature to declare what shall be a reasonable compensation under such circumstances, or, perhaps more properly speaking, to fix a maximum beyond which any charge made would be unreasonable. . . . The controlling fact is the power to regulate at all. . . .

We know that this is a power which may be abused; but that is no argument against its existence. For protection against abuses by the legislature the people must resort to the polls, not to the courts. . . .

We come now to consider the effect upon this statute of the power of Congress to regulate commerce.

It was very properly said in the case of the *State Tax on Railway Gross Receipts*, 15 Wall. 293, that "it is not every thing that affects commerce that amounts to a regulation of it, within the meaning of the Constitution." The warehouses of these plaintiffs in error are situated and their business carried on exclusively within the limits of the State of Illinois. They are used as instruments by those engaged in State as well as those engaged in inter-state commerce, but they are no more necessarily a part of commerce itself than the dray or the cart by which, but for them, grain would be transferred from one railroad station to another. . . . Their regulation is a thing of domestic concern, and, certainly, until Congress acts in reference to their inter-state relations, the State may exercise all the powers of government over them, even though in so doing it may indirectly operate upon commerce outside its immediate jurisdiction. . . .

MR. JUSTICE FIELD and MR. JUSTICE STRONG dissented.

MR. JUSTICE FIELD. I am compelled to dissent. . . . The principle upon which the opinion of the majority proceeds is, in my judgment, subversive of the rights of private property . . . and is in conflict with the authorities cited in its support.

The question presented, therefore, is one of the greatest importance, —whether it is within the competency of a State to fix the compensation which an individual may receive for the use of his own property in his private business, and for his services in connection with it.

The declaration of the Constitution of 1870, that private buildings used for private purposes shall be deemed public institutions, does not make them so. The receipt and storage of grain in a building erected by private means for that purpose does not constitute the building of a public warehouse. There is no magic in the language, though used by a constitutional convention, which can change a private business into a public one, or alter the character of the building in which the business is transacted. . . . The defendants were no more public warehousemen . . . than the merchant who sells his merchandise to the public is a public merchant, or the blacksmith who shoes horses for the public is a public blacksmith, and it was a strange notion that by calling them so they would be brought under legislative control.

. . . . But it would seem from its opinion that the court holds that property loses something of its private character when employed in such a way as to be generally useful. The doctrine declared is that property “becomes clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large;” and from such clothing the right of the legislature is deduced to control the use of the property, and to determine the compensation which the owner may receive for it. When Sir Matthew Hale, and the sages of the law in his day, spoke of property as affected by a public interest, and ceasing from that cause to be *juris privati* solely, that is, ceasing to be held merely in private right, they referred to property dedicated by the owner to public uses, or to property the use of which was granted by the government, or in connection with which special privileges were conferred. Unless the property was thus dedicated, or some right bestowed by the government was held with the property, . . . the property was not affected by any public interest so as to be taken out of the category of property held in private right. But it is not in any such sense that the terms “clothing property with a public interest” are used in this case. From the nature of the business under consideration—the storage of grain—which, in any sense in which the words can be used, is a private business . . . it is clear that the court intended to declare that, whenever one devotes his property to a business which is useful to the public,

—"affects the community at large,"—the legislature can regulate the compensation which the owner may receive for its use, and for his own services in connection with it. . . . The building used by the defendants was for the storage of grain: in such storage, says the court, the public has an interest; therefore the defendants, by devoting the building to that storage, have granted the public an interest in that use, and must submit to have their compensation regulated by the legislature.

If this be sound law, . . . all property and all business in the State are held at the mercy of a majority of its legislature. . . . The public is interested in the manufacture of cotton, woolen, and silken fabrics, in the construction of machinery, in the printing and publication of books and periodicals, and in the making of utensils of every variety, useful and ornamental; indeed there is hardly an enterprise or business engaging the attention and labor of any considerable portion of the community, in which the public has not an interest in the sense in which that term is used by the court in this opinion; and the doctrine which allows the legislature to interfere with and regulate the charges which the owners of property thus employed shall make for its use, that is, the rates at which all these different kinds of business shall be carried on, has never before been asserted, so far as I am aware, by any judicial tribunal in the United States.

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No State "shall deprive any person of life, liberty, or property without due process of law," says the Fourteenth Amendment to the Constitution. . . .

The same liberal construction which is required for the protection of life and liberty . . . should be applied to the protection of private property. If the legislature of a State, under pretence of providing for the public good, or for any other reason, can determine, against the consent of the owner, the uses to which private property shall be devoted, or the prices which the owner shall receive for its uses, it can deprive him of the property as completely as by a special act for its confiscation or destruction. If, for instance, the owner . . . is compelled to take as compensation for its use less than the expenses to which he is subjected by its ownership, he is, for all practical purposes, deprived of his property, as effectually as if the legislature had ordered his forcible dispossession. . . . The amount fixed will operate as a partial destruction of the value of the property, if it fall below the amount which the owner would obtain by contract. . . . There is, indeed, no protection of any value under the constitutional provision, which does not extend to the use and income of the property, as well as to its title and possession.

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The power of the State over the property of the citizen under the constitutional guaranty is well defined. The State may take his property for public uses, upon just compensation being made therefor. It may take a portion of his property by way of taxation for the support of the government. It may control the use and possession of his property, so far as may be necessary for the protection of the rights of others, and to secure to them the equal use and enjoyment of their property. . . . Except in cases where property may be destroyed to arrest a conflagration or the ravages of pestilence, or be taken under the pressure of an immediate and overwhelming necessity to prevent a public calamity, the power of the State over the property of the citizen does not extend beyond such limits.

It is true that the legislation which secures to all protection in their rights, and the equal use and enjoyment of their property, embraces an almost infinite variety of subjects. Whatever affects the peace, good order, morals, and health of the community, comes within its scope; and every one must use and enjoy his property subject to the restrictions which such legislation imposes. What is termed the police power of the State, which, from the language often used respecting it, one would suppose to be an undefined and irresponsible element in government, can only interfere with the conduct of individuals in their intercourse with each other, and in the use of their property, so far as may be required to secure these objects. The compensation which the owners of property, not having any special rights or privileges from the government in connection with it, may demand for its use, or for their own services in union with it, forms no element of consideration in prescribing regulations for that purpose. . . . One may go . . . through the whole round of regulations authorized by legislation, State or municipal, under what is termed the police power, and in no instance will he find that the compensation of the owner for the use of his property has any influence in establishing them. . . .

There is nothing in the character of the business of the defendants as warehousemen which called for the interference complained of in this case. Their buildings are not nuisances; their occupation of receiving and storing grain infringes upon no rights of others, disturbs no neighborhood, infects not the air, and in no respect prevents others from using and enjoying their property as to them may seem best. The legislation in question is nothing less than a bold assertion of absolute power by the State to control at its discretion the property and business of the citizen, and fix the compensation he shall receive. . . . The decision of the court in this case gives unrestrained license to legislative will.

The several instances mentioned by counsel in the argument, and by the court in its opinion, in which legislation has fixed the compensation

which parties may receive for the use of their property and services, do not militate against the views I have expressed of the power of the State over the property of the citizen. They were mostly cases of public ferries, bridges, and turnpikes, of wharfingers, hackmen, and draymen, and of interest on money. In all these cases, except that of interest on money . . . there was some special privilege granted by the State or municipality; and no one, I suppose, has ever contended that the State had not a right to prescribe the conditions upon which such privilege should be enjoyed. . . . The conditions upon which the privilege shall be enjoyed being stated or implied in the legislation authorizing its grant, no right is, of course, impaired by their enforcement. The recipient of the privilege, in effect, stipulates to comply with the conditions. . . . The privilege which the hackman and drayman have to the use of stands on the public streets, not allowed to the ordinary coachman or laborer with teams, constitutes a sufficient warrant for the regulation of their fares. In the case of the warehousemen of Chicago, no right or privilege is conferred by the government upon them; and hence no assent of theirs can be alleged to justify any interference with their charges for the use of their property.

The quotations from the writings of Sir Matthew Hale, so far from supporting the positions of the court, do not recognize the interference of the government, even to the extent which I have admitted to be legitimate. They state merely that the franchise of a public ferry belongs to the king, and cannot be used by the subject except by license from him, or prescription time out of mind; and that when the subject has a public wharf by license from the king, or from having dedicated his private wharf to the public, as in the case of a street opened by him through his own land, he must allow the use of the wharf for reasonable and moderate charges. . . . [The learned justice proceeds to quote directly from *De Juris Maris* and *De Portibus Maris*.]

I do not doubt the justice of the encomiums passed upon Sir Matthew Hale as a learned jurist of his day; but I am unable to perceive the pertinency of his observations upon public ferries and public wharves, found in his treatises on "The Rights of the Sea" and on "The Ports of the Sea," to the questions presented by the warehousing law of Illinois, undertaking to regulate the compensation received by the owners of private property, when that property is used for private purposes. . . .

MR. JUSTICE STRONG. . . . I concur in what he has said.

NOTE ON THE PRINCIPLE OF *MUNN v. ILLINOIS*

In *Munn v. Illinois* the court announced unequivocally that it would sustain the States in the broad programs of regulation which they adopted

in the 70s. The dissent of Mr. Justice Field indicates that the court was responding not so much to the principles of the common law as to prevalent public opinion. The whole decision shows what the court can do with the Constitution when it is minded in tune with contemporary reformist ideals. The court's refusal to take cognizance of the reasonableness of legislative fixation of maximum charges is noteworthy because the court was later to reverse its position on this point, and to proceed beyond it.

Immediately following the *Munn* case in the 94th volume of the Reports are the famous Granger Cases, in which the court applied the doctrine laid down in the principal case. These are: *Chicago, Burlington, and Quincy Railroad Company v. Iowa*; *Peik v. Chicago and North-western Railway Company*; *Chicago, Milwaukee, and St. Paul Railroad Company v. Ackley*; *Winona and St. Peter Railroad Company v. Blake*; and, *Stone v. Wisconsin*. The majority in each case was that of the principal case; in each, the Chief Justice delivered the opinion of the court. Mr. Justice Field, while he dissented with his colleague, Mr. Justice Strong, in each case, delivered an opinion only in the last one, but put it in language applying to all of them. The question thus defined within the Court was to divide that body for years to come.

It is commonly said that the *Shreveport Case*, (Chapter 8 this volume), overruled *Peik v. Chicago and North-western Railway Company*; the ruling made in the latter case follows:

The law is confined to State commerce, or such inter-state commerce as directly affects the people of Wisconsin. Until Congress acts in reference to the relations of this company to inter-state commerce, it is certainly within the power of Wisconsin to regulate its fares, &c., so far as they are of domestic concern. With the people of Wisconsin this company has domestic relations. Incidentally, these may reach beyond the State. But certainly, until Congress undertakes to legislate for those who are without the State, Wisconsin may provide for those within, even though it may indirectly affect those without. 94 U.S. 164, 177, 178 (1876).

Mr. Justice Field's final comment on the principle of *Munn v. Illinois* is:

So long as that decision remains, it will be a waste of words to discuss the questions argued by counsel in these cases. That decision, in its wide sweep, practically destroys all the guaranties of the Constitution and of the common law invoked by counsel for the protection of the rights of the railroad companies. Of what avail is the constitutional provision that no State shall deprive any person of his property except by due process of law, if the State can, by fixing the compensation which he may receive for its use, take from him all that is valuable in the property? *Stone v. Wisconsin*, 94 U.S. 181, 186 (1876).

The *Munn* dissent is significant for the following reasons:

1. It is the best exposition of the economic theory of the conservative wing of the Supreme Court from the time of its statement to the retirement of Mr. Justice Butler in 1939. He was the last of the group holding to this point of view.
2. This view became that of the majority in *Adams v. Tanner*, 244 U.S. 590 (1917), given below. It dominated the Supreme Court from 1923, the year of *Adkins v. Children's Hospital*, to 1934, the year of *Nebbia v. New York* (reproduced in the chapter on the New Deal).
3. The effect of the Field philosophy was, in the long run, to (a) contract the doctrine of the public interest as it received expression in the *Munn* opinion and to (b) restrict the scope of the police power within limits much narrower than those indicated by Mr. Justice Holmes in the *Noble State Bank* case. The restatement of the public interest doctrine in the *Wolff Packing Co.* case, below, is actually a masterly synthesis of the liberal and conservative positions.
4. The *Nebbia Case* ends the significance of the classification of business clothed with a public interest as an element in the jurisprudence of the Court; it does so by returning to the Holmesian view of the police power as stated in the *Noble State Bank* case.

WOLFF PACKING CO. v. COURT OF INDUSTRIAL RELATIONS.

Supreme Court of the United States. 1923.
262 U.S. 522.

The Charles Wolff Packing Company, the plaintiff in error, is a corporation of Kansas engaged in slaughtering hogs and cattle and preparing the meat for sale and shipment. . . . More than half its products are sold beyond the State. It has three hundred employees. . . .

In January, 1921, the president and secretary of the Meat Cutters Union filed a complaint with the Industrial Court against the Packing Company respecting the wages its employees were receiving. The Company appeared and answered and a hearing was had. The court made findings, including one of an emergency, and an order as to wages, increasing them over the figures to which the Company had recently reduced them. The Company refused to comply with the order and the Industrial Court then instituted mandamus proceedings in the Supreme Court to compel compliance. . . . The Supreme Court . . . held that the evidence showed a sufficient emergency. . . .

It appeared from the evidence that the Company and plant were under the control of, and in business association with, what were called "The Allied Packers," who . . . compete with the so-called Big Five Packers. . . . The chief executive of the Wolff Company testified that there had been no difficulty in securing all the labor it desired at the reduced rates offered. The Industrial Court conceded that the Wolff

Company could not operate on the schedule fixed without a loss, but relied on the statement by its president that he hoped for more prosperous times. . . .

MR. CHIEF JUSTICE TAFT, after stating the case as above, delivered the opinion of the Court.

The necessary postulate of the Industrial Court Act is that the State, representing the people, is so much interested in their peace, health and comfort that it may compel those engaged in the manufacture of food, and clothing, and the production of fuel, whether owners or workers, to continue in their business and employment on terms fixed by an agency of the State if they can not agree. Under the construction adopted by the State Supreme Court the act gives the Industrial Court authority to permit the owner or employer to go out of the business, if he shows that he can only continue on the terms fixed at such heavy loss that collapse will follow; but this privilege under the circumstances is generally illusory. . . . A laborer dissatisfied with his wages is permitted to quit, but he may not agree with his fellows to quit or combine with others to induce them to quit.

These qualifications do not change the essence of the act. It curtails the right of the employer on the one hand, and of the employee on the other, to contract about his affairs. This is part of the liberty of the individual protected by the guaranty of the due process clause of the Fourteenth Amendment. . . . While there is no such thing as absolute freedom of contract and it is subject to a variety of restraints, they must not be arbitrary or unreasonable. Freedom is the general rule, and restraint the exception. The legislative authority to abridge can be justified only by exceptional circumstances. . . .

Businesses said to be clothed with a public interest justifying some public regulation may be divided into three classes:

(1) Those which are carried on under the authority of a public grant of privileges which either expressly or impliedly imposes the affirmative duty of rendering a public service demanded by any member of the public. Such are the railroads, other common carriers and public utilities.

(2) Certain occupations, regarded as exceptional, the public interest attaching to which, recognized from earliest times, has survived the period of arbitrary laws by Parliament or colonial Legislatures for regulating all trades and callings. Such are those of the keepers of inns, cabs, and gristmills. . . .

(3) Businesses which, though not public at their inception, may be fairly said to have risen to be such and have become subject in conse-

quence to some government regulation. They have come to hold such a peculiar relation to the public that this is superimposed upon them. In the language of the cases, the owner by devoting his business to the public use, in effect grants the public an interest in that use and subjects himself to public regulation to the extent of that interest although the property continues to belong to its private owner and to be entitled to protection accordingly. . . .

It is manifest . . . that the mere declaration by a Legislature that a business is affected with a public interest is not conclusive of the question whether its attempted regulation on that ground is justified. The circumstances of its alleged change from the status of a private business and its freedom from regulation into one in which the public have come to have an interest are always a subject of judicial inquiry.

In a sense, the public is concerned about all lawful business because it contributes to the prosperity and well-being of the people. The public may suffer from high prices or strikes in many trades, but the expression "clothed with a public interest," as applied to a business, means more than that the public welfare is affected by continuity or by the price at which a commodity is sold or a service rendered. The circumstances which clothe a particular kind of business with a public interest, in the sense of *Munn v. Illinois* and the other cases, must be such as to create a peculiarly close relation between the public and those engaged in it, and raise implications of an affirmative obligation on their part to be reasonable in dealing with the public. . . .

It has never been supposed, since the adoption of the Constitution, that the business of the butcher, or the baker, the tailor, the wood chopper, the mining operator, or the miner was clothed with such a public interest that the price of his product or his wages could be fixed by state regulation. . . .

An ordinary producer, manufacturer, or shopkeeper may sell or not sell as he likes, . . . and while this feature does not necessarily exclude businesses from the class clothed with a public interest, *German Alliance Ins. Co. v. Lewis*, 233 U.S. 389, it usually distinguishes private from quasi-public occupations.

In nearly all the business included under the third head above, the thing which gave the public interest was the indispensable nature of the service and the exorbitant charges and arbitrary control to which the public might be subjected without regulation. . . .

It is very difficult under the cases to lay down a working rule by which readily to determine when a business has become "clothed with a public interest." All business is subject to some kinds of public regulation, but when the public becomes so peculiarly dependent upon a particular business that one engaging therein subjects himself to a more

intimate public regulation is only to be determined by the process of exclusion and inclusion and to gradual establishment of a line of distinction. We are relieved from considering and deciding definitely whether preparation of food should be put in the third class of quasi-public businesses, noted above, because, even so, the valid regulation to which it might be subjected as such, could not include what this act attempts.

To say that a business is clothed with a public interest is not to determine what regulation may be permissible in view of the private rights of the owner. The extent to which an inn or a cab system may be regulated may differ widely from that allowable as to a railroad or other common carrier. It is not a matter of legislative discretion solely. It depends on the nature of the business, on the feature which touches the public, and on the abuses reasonably to be feared. To say that a business is clothed with a public interest is not to import that the public may take over its entire management and run it at the expense of the owner. The extent to which regulation may reasonably go varies with different kinds of business. The regulation of rates to avoid monopoly is one thing. The regulation of wages is another. A business may be of such character that only the first is permissible, while another may involve such a possible danger of monopoly on the one hand, and such disaster from stoppage on the other, that both come within the public concern and power of regulation.

If, as, in effect, contended for the State, the common callings are clothed with a public interest by a mere legislative declaration, which necessarily authorizes full and comprehensive regulation within legislative discretion, there must be a revolution in the relation of government to general business. This will be running the public interest argument into the ground, to use a phrase of Mr. Justice Bradley when characterizing a similarly extreme contention. *Civil Rights Cases*, 109 U.S. 3, 24. It will be impossible to reconcile such result with the freedom of contract and of labor secured by the Fourteenth Amendment.

This brings us to the nature and purpose of the regulation under the Industrial Court Act. The avowed object is continuity of food, clothing and fuel supply. By section 6 reasonable continuity and efficiency of the industries specified are declared to be necessary for the public peace, health and general welfare, and all are forbidden to hinder, limit or suspend them. Section 7 gives the industrial court power in case of controversy between employers and workers which may endanger the continuity or efficiency of service, to bring the employer and employees before it and after hearing and investigation to fix the terms and conditions between them. The employer is bound by this act to pay the wages fixed and while the worker is not required to work, at the wages fixed, he is forbidden, on penalty of fine or imprisonment, to strike against

them and thus is compelled to give up that means of putting himself on an equality with his employer which action in concert with his fellows gives him.

There is no authority of this court to sustain such exercise of power in respect to those kinds of business affected with a public interest by a change *in pais*, first fully recognized by this Court in *Munn v. Illinois*, *supra*, where it said (94 U.S. 126):

"Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he in effect grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. *He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control.*"

These words refute the view that public regulation in such cases can secure continuity of a business against the owner. The theory is that of revocable grant only. . . . If that be so with the owner and employer, *a fortiori* must it be so with the employee. . . . It can only arise when investment by the owner and entering the employment by the worker create a conventional relation to the public somewhat equivalent to the appointment of officers and the enlistment of soldiers and sailors in military service. . . .

The minutely detailed government supervision, including that of their relations to their employees, to which the railroads of the country have been gradually subject by Congress through its power over interstate commerce, furnishes no precedent for the regulation of the business of the plaintiff in error, whose classification as public is at the best doubtful. . . .

We think the Industrial Court Act, in so far as it permits the fixing of wages in plaintiff in error's packing house, is in conflict with the Fourteenth Amendment. . . .

TYSON & BROTHER v. BANTON.

Supreme Court of the United States. 1927.

273 U.S. 418.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

Appellant is engaged in the business of reselling tickets of admission to theatres and other places of entertainment in the City of New York. . . . These tickets are obtained either from the box office of the theatre

or from other brokers and distributors. It is duly licensed under # 168, c. 590, New York Laws, 1922. . . .

Section 167 of chapter 590 declares that the price of or charge for admission to theatres, etc., is a matter affected with a public interest and subject to state supervision in order to safeguard the public against fraud, extortion, exorbitant rates and similar abuses. Section 172 forbids the resale of any ticket "at a price in excess of fifty cents in advance of the price printed on the face of such ticket or other evidence of the right of entry."

Strictly, the question for determination relates only to the maximum price for which an entrance ticket to a theatre, etc., may be resold. But the answer necessarily must be to a question of greater breadth. . . . And since the ticket broker is a mere appendage of the theatre, etc., and the *price of or charge for admission* is the essential element in the statutory declaration, it results that the real inquiry is whether every public exhibition to which an admission charge is made, is clothed with a public interest, so as to authorize a law-making body to fix the maximum amount of the charge, which its patrons may be required to pay.

In the endeavor to reach a correct conclusion in respect of this inquiry, it will be helpful, by way of preface, to state certain pertinent considerations. The first of these is that the right of the owner to fix a price at which his property shall be sold or used is an inherent attribute of the property itself, *Case of the State Freight Tax*, 15 Wall. 232, 278, and, as such, within the due process of law clauses of the Fifth and Fourteenth Amendments. . . . The power to regulate property, services or business can be invoked only under special circumstances; and it does not follow that because the power may exist to regulate in some particulars it exists to regulate in others or in all.

The authority to regulate the conduct of a business or to require a license, comes from a branch of the police power which may be quite distinct from the power to fix prices. The latter, ordinarily, does not exist in respect of merely private property or business but exists only where the business or property involved has become "affected with a public interest." This phrase, first used by Lord Hale 200 years ago, it is true, furnishes at best an indefinite standard, and attempts to define it have resulted, generally, in producing little more than paraphrases, which themselves require elucidation. Certain properties and kinds of business it obviously includes, like common carriers, telegraph and telephone companies, ferries, wharfage, etc. Beyond these, its application not only has not been uniform, but many of the decisions disclose the members of the same court in radical disagreement. Its full meaning, like that of many other generalizations, cannot be exactly defined;—it can only be approximated.

A business is not affected with a public interest merely because it is large or because the public are warranted in having a feeling of concern in respect of its maintenance. Nor is the interest meant such as arises from the mere fact that the public derives benefit, accommodation, ease or enjoyment from the existence or operation of the business; and while the word has not always been limited narrowly as strictly denoting "a right," that synonym more nearly than any other expresses the sense in which it is to be understood. . . .

And, finally, the mere declaration by the legislature that a particular kind of property or business is affected with a public interest is not conclusive upon the question of the validity of the regulation. The matter is one which is always open to judicial inquiry. . . .

. . . . The leading, as well as the earliest, definite decision dealing with a business falling within that class is *Munn v. Illinois* [94 U.S. 113,] which sustained the validity of an Illinois statute fixing the maximum charge to be made for the use of elevators and warehouses for the elevation and storage of grain. . . .

There is some general language in the opinion which, superficially, might seem broad enough to cover cases like the present one. . . .

The significant requirement is that the property shall be devoted to a use in which the public has an interest, which simply means, as in terms it is expressed at page 130, that it shall be devoted to "a public use." Stated in another form, a business or property, in order to be affected with a public interest, must be such or be so employed as to justify the conclusion that it has been *devoted* to a public use and its use, thereby, in effect, *granted* to the public. . . .

German Alliance Ins. Co. v. Kansas, 233 U.S. 389, carries the doctrine further and marks the extreme limit to which this court thus far has gone in sustaining price fixing legislation. There the court said that a business might be affected with a public interest so as to permit price regulation although no public trust was impressed upon the property and although the public might not have a legal right to demand and receive service; and it was held that fire insurance was such a business. Mr. Justice McKenna, speaking for the court, pointed out that in an insurance business each risk was not individual. . . . Discussing the question whether the business was affected with a public interest so as to justify regulation of rates, it was then said (p. 406):

"And we mean a broad and definite public interest. In some degree the public interest is concerned in every transaction between men. . . ."

And again (p. 413):

"Contracts of insurance, therefore, have greater public consequence than contracts between individuals to do or not to do a particular thing whose effect stops with the individuals." . . .

Answering the objection that the reasoning of the opinion would subject every act of human endeavor and the price of every article of human use to regulation, it was said (p. 415):

"And both by the expression of the principle and the citation of the examples we have tried to confine our decision to the regulation of the business of insurance. . . ."

This observation fairly may be regarded as a warning at least to be cautious about invoking the decision as a precedent for the determination of cases involving other kinds of business. And this view is borne out by a general consideration of the case. . . . Insurance companies do not sell commodities;—they do not sell anything. They are engaged in making contracts with and collecting premiums from a large number of persons, the effect of their activities being to constitute a guaranty against individual loss. . . .

Lord Hale's statement that when private property is "affected with a public interest, it ceases to be *juris privati* only," is accepted by this court as the guiding principle in cases of this character. That this phrase was not intended by its author to include private undertakings, like those enumerated in the statute now under consideration, is apparent when we consider the connection in which it was used. . . .

It is clear that, as there announced, the rule is confined to conveniences made public because the privilege of maintaining them has been *granted* by government or because there has arisen what may be termed a *constructive grant* of the use to the public. . . .²

A theatre or other place of entertainment does not meet this conception of Lord Hale's aphorism or fall within the reasons of the decisions of this court based upon it. A theatre is a private enterprise, which, in its relation to the public, differs obviously and widely, both in character and degree, from a grain elevator, standing at the gateway of commerce and exacting toll, amounting to a common charge, for every bushel of grain which passes on its way among the states; or stockyards, standing in like relation to the commerce in live stock; or an insurance company, engaged, as a sort of common agency, in collecting and holding a guaranty fund in which definite and substantial rights are enjoyed by a considerable portion of the public. . . . And, certainly, a place of entertainment is in no legal sense a public utility; and, quite as certainly, its activities are not such that their enjoyment can be regarded under any conditions from the point of view of an emergency.

The interest of the public in theatres and other places of entertainment may be more nearly, and with better reason, assimilated to the like interest in provisions stores and markets and in the rental of houses and apartments for residence purposes; although in importance it falls

² See the dissenting opinion of Mr. Justice Field in the Munn Case.—Ed.

below such an interest in the proportion that food and shelter are of more moment than amusement or instruction. . . .

It is urged that the statutory provision under review may be upheld as an appropriate method of preventing fraud, extortion, collusive arrangements between the management and those engaged in reselling tickets, and the like. That such evils exist in some degree in connection with the theatrical business and its ally, the ticket broker, is undoubtedly true. . . . But evils are to be suppressed or prevented by legislation which comports with the Constitution, and not by such as strikes down those essential rights of private property protected by that instrument against undue governmental interference. One vice of the contention is that the statute itself ignores the righteous distinction between guilt and innocence, since it applies wholly irrespective of the existence of fraud, collusion or extortion and fixes the resale price as well where the evils are absent as where they are present. It is not permissible to enact a law which, in effect, spreads an all-inclusive net for the feet of everybody upon the chance that, while the innocent will surely be entangled in its meshes, some wrong-doers also may be caught. . . .

The evil of collusive alliances between the proprietors of theatres and ticket brokers or scalpers seems to have been effectively dealt with in Illinois by an ordinance which required (1) that the price of every theatre ticket shall be printed on its face and (2) that no proprietor, employee, etc., of a theatre shall receive or enter into any arrangement or agreement to receive more. . . . But the important distinction is that the ordinance did not forbid the resale of the ticket by a purchaser of it for any price he was able to secure, or forbid the fixing of any price by the proprietor which he thought fit. . . .

It should not be difficult similarly to define and penalize in specific terms other practices of a fraudulent character, the existence or apprehension of which is suggested in brief and argument. But the difficulty or even the impossibility of thus dealing with the evils, if that should be conceded, constitutes no warrant for suppressing them by methods precluded by the Constitution. Such subversions are not only illegitimate but are fraught with the danger that, having begun on the ground of necessity, they will continue on the score of expediency, and, finally, as a mere matter of course. Constitutional principles, applied as they are written, it must be assumed, operate justly and wisely as a general thing, and they may not be remolded by lawmakers or judges to save exceptional cases of inconvenience, hardship or injustice. . . .

MR. JUSTICE HOLMES, dissenting.

We fear to grant power and are unwilling to recognize it when it exists. The States very generally have stripped jury trials of one of their

most important characteristics by forbidding the judge to advise the jury upon the facts . . . , and when legislatures are held to be authorized to do anything considerably affecting public welfare it is covered by apologetic phrases like the police power, or the statement that the business concerned has been dedicated to a public use. The former expression is convenient, to be sure, to conciliate the mind to something that needs explanation: the fact that the constitutional requirement of compensation when property is taken cannot be pressed to its grammatical extreme; that property rights may be taken for public purposes without pay if you do not take too much; that some play must be allowed to the joints if the machine is to work. But police power often is used in a wide sense to cover and, as I said, to apologize for the general power of the legislature to make a part of the community uncomfortable by a change.

I do not believe in such apologies. I think the proper course is to recognize that a state legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the State, and that Courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular Court may happen to entertain. Coming down to the case before us I think, as I intimated in *Adkins v. Children's Hospital*, 261 U.S. 525, 569, that the notion that a business is clothed with a public interest and has been devoted to the public use is little more than a fiction intended to beautify what is disagreeable to the sufferers. The truth seems to me to be that, subject to compensation when compensation is due, the legislature may forbid or restrict any business when it has a sufficient force of public opinion behind it. Lotteries were thought useful adjuncts of the State a century or so ago; now they are believed to be immoral and they have been stopped. Wine has been thought good for man from the time of the Apostles until recent years. But when public opinion changed it did not need the Eighteenth Amendment, notwithstanding the Fourteenth, to enable a State to say that the business should end. . . . What has happened to lotteries and wine might happen to theatres in some moral storm of the future, not because theatres were devoted to a public use, but because people had come to think that way.

But if we are to yield to fashionable conventions, it seems to me that theatres are as much devoted to public use as anything well can be. We have not that respect for art that is one of the glories of France. But to many people the superfluous is the necessary, and it seems to me that Government does not go beyond its sphere in attempting to make life livable for them. I am far from saying that I think this particular law a wise and rational provision. That is not my affair. But if the people of

the State of New York speaking by their authorized voice say that they want it, I see nothing in the Constitution of the United States to prevent their having their will.

MR. JUSTICE BRANDEIS concurs in this opinion.

MR. JUSTICE STONE, dissenting.

I can agree with the majority that "constitutional principles, applied as they are written, it must be assumed, operate justly and wisely as a general thing, and they may not be remolded by lawmakers or judges to save exceptional cases of inconvenience, hardship, or injustice." But I find nothing written in the Constitution, and nothing in the case or common law development of the Fourteenth Amendment, which would lead me to conclude that the type of regulation attempted by the State of New York is prohibited.

The scope of our inquiry has been repeatedly defined by the decisions of this Court. As was said in *Munn v. Illinois*, 94 U.S. 113, 132, by Chief Justice Waite, "For us the question is one of power, not of expediency. If no state of circumstances could exist to justify such a statute, then we may declare this one void, because in excess of the legislative power of the state. But if it could, we must presume it did. Of the propriety of legislative interference within the scope of legislative power, the legislature is the exclusive judge." The attitude in which we should approach new problems in the field of price regulation was indicated in *German Alliance Ins. Co. v. Kansas*, 233 U.S. 389, 409: "Against that conservatism of the mind, which puts to question every act of regulating legislation and regards the legislation invalid or dangerous until it has become familiar, government—state and National—has pressed on in the general welfare; and our reports are full of cases where in instance after instance the exercise of the regulation was resisted and yet sustained against attacks asserted to be justified by the Constitution of the United States. The dread of the moment having passed, no one is now heard to say that rights were restrained or constitutional guarantees impaired."

The question with which we are here concerned is much narrower than the one which has been principally discussed by the Court. It is not whether there is constitutional power to fix the price which theatre owners and producers may charge for admission. Although the statute in question declares that the price of tickets of admission to places of amusement is affected with a public interest, it does not purport to fix prices of admission. The producer or theatre proprietor is free to charge any price he chooses. The statute requires only that the sale price,

whatever it is, be printed on the face of the ticket, and prohibits the licensed ticket broker, an intermediary in the marketing process, from reselling the ticket at an advance of more than fifty cents above the printed price. Nor is it contended that this limit on the profit is unreasonable. . . .

There are about sixty first class theatres in the borough of Manhattan. Brokers annually sell about two million tickets, principally for admission to these theatres. Appellant sells three hundred thousand tickets annually. The practice of the brokers, as revealed by the record, is to subscribe, in advance of the production of the play and frequently before the cast is chosen, for tickets covering a period of eight weeks. The subscriptions must be paid two weeks in advance and about twenty-five per cent. of the tickets unsold may be returned. A virtual monopoly of the best seats, usually the first fifteen rows, is thus acquired and the brokers are enabled to demand extortionate prices of theatre goers. Producers and theatre proprietors are eager to make these advance sales which are an effective insurance against loss arising from unsuccessful productions. The brokers are in a position to prevent the direct purchase of tickets to the desirable seats and to exact from the patrons of the successful productions a price sufficient to pay the loss of those which are unsuccessful, plus an excessive profit to the broker.

It is undoubtedly true as a general proposition that one of the incidents of the ownership of property is the power to fix the price at which it may be disposed. It may be also assumed that as a general proposition, under the decisions of this Court, the power of state governments to regulate and control prices may be invoked only in special and not well defined circumstances. But when that power is invoked in the public interest and in consequence of the gross abuse of private right disclosed by this record, we should make searching and critical examination of those circumstances which in the past have been deemed sufficient to justify the exercise of the power, before concluding that it may not be exercised here.

The phrase "business affected with a public interest" seems to me too vague and illusory to carry us very far on the way to a solution. It tends in use to become only a convenient expression for describing those businesses, regulation of which has been permitted in the past. To say that only those businesses affected with a public interest may be regulated is but another way of stating that all those businesses which may be regulated are affected with a public interest. It is difficult to use the phrase free of its connotation of legal consequences, and hence when used as a basis of judicial decision, to avoid begging the question to be decided. The very fact that it has been applied to businesses unknown to Lord Hale, who gave sanction to its use, should caution us against

the assumption that the category has now become complete or fixed and that there may not be brought into it new classes of business or transactions not hitherto included, in consequence of newly devised methods of extortionate price exaction.

The constitutional theory that prices normally may not be regulated rests upon the assumption that the public interest and private right are both adequately protected when there is "free" competition among buyers and sellers, and that in such a state of economic society, the interference with so important an incident of the ownership of private property as price fixing is not justified and hence is a taking of property without due process of law.

Statutory regulation of price is commonly directed toward the prevention of exorbitant demands of buyers or sellers. An examination of the decisions of this Court in which price regulation has been upheld will disclose that the element common to all is the existence of a situation or a combination of circumstances materially restricting the regulative force of competition, so that buyers or sellers are placed at such a disadvantage in the bargaining struggle that serious economic consequences result to a very large number of members of the community. Whether this situation arises from the monopoly conferred upon public service companies or from the circumstance that the strategic position of a group is such as to enable it to impose its will in matters of price upon those who sell, buy or consume, as in *Munn v. Illinois*, *supra*; or from the predetermination of prices in the councils of those who sell, promulgated in schedules of practically controlling constancy, as in *German Alliance Ins. Co. v. Kansas*, *supra*, or from a housing shortage growing out of a public emergency as in *Block v. Hirsh*, 256 U.S. 135 , the result is the same. Self interest is not permitted to invoke constitutional protection at the expense of the public interest and reasonable regulation of price is upheld.

That should be the result here. We need not attempt to lay down any universal rule to apply to new and unknown situations. It is enough for present purposes that this case falls within the scope of the earlier decisions and that the exercise of legislative power now considered was not arbitrary. The question as stated is not one of reasonable prices, but of the constitutional right in the circumstances of this case to exact exorbitant profits beyond reasonable prices. The economic consequence of this regulation upon individual ownership is no greater, nor is it essentially different from that inflicted by regulating rates to be charged by laundries , by anti-monopoly laws, Sunday laws, usury statutes, the zoning ordinance upheld in *Village of Euclid v. Ambler Realty Co.*, [272 U.S. 365]; or state statutes restraining the owner of land from leasing it to Japanese or Chinese aliens ;

or state prohibition laws . . . ; or legislation prohibiting option contracts for future sales of grain . . . , or invalidating sales of stock on margin or for "futures," . . . or statutes preventing the maintenance of pool parlors . . . , or in numerous other cases in which the exercise of private rights has been restrained in the public interest. . . . Nor is the exercise of the power less reasonable because the interests protected are in some degree less essential to life than some others. Laws against monopoly which aim at the same evil and accomplish their end by interference with private rights quite as much as the present law are not regarded as arbitrary or unreasonable or unconstitutional because they are not limited in their application to dealings in the bare necessities of life.

The problem sought to be dealt with has been the subject of earlier legislation in New York and has engaged the attention of the legislators of other states. That it is one involving serious injustice to great numbers of individuals who are powerless to protect themselves cannot be questioned. Its solution turns upon consideration of economics about which there may be reasonable differences of opinion. Choice between these views takes us from the judicial to the legislative field. The judicial function ends when it is determined that there is a basis for legislative action in a field not withheld from legislative power by the Constitution as interpreted by the decisions of this Court. . . .

MR. JUSTICE HOLMES and MR. JUSTICE BRANDEIS join in this dissent.

MR. JUSTICE SANFORD, dissenting.

I regret that I cannot agree with the opinion of the Court in this case. My own view is more nearly that expressed by Mr. Justice Stone. Shortly stated, it is this: The case, I think, does not involve the question whether the business of theatre owners offering their separate entertainments is so affected with a public interest that the price which they themselves charge for tickets is subject to regulation by the legislature, but the very different question whether the business of ticket brokers who intervene between the theatre owners and the general public in the sale of theatre tickets is affected with a public interest, and may, under the circumstances disclosed in this case, be regulated by the legislature to the extent of preventing them from selling tickets at more than a reasonable advance upon the theatre prices.

In *Munn v. Illinois*, 94 U.S. 113, 132, . . . it was held that the separate business of grain elevators, which "stood in the very gateway of commerce" in grain, "taking toll" from all who passed and tending to a common charge, had become, by the facts, clothed "with a public interest" and was subject to public regulation limiting the charges to a

reasonable toll. So, I think, that here the business of the ticket brokers, who stand in "the very gateway" between the theatres and the public, depriving the public of access to the theatres for the purchase of desirable seats at the regular prices, and exacting toll from patrons of the theatres desiring to purchase such seats, has become clothed with a public interest and is subject to regulation by the legislature limiting their charges to reasonable exactions and protecting the public from extortion and exorbitant rates. . . . And in *Wolff Co. v. Industrial Court*, 262 U.S. 522, 535, it was recognized that a business, although not public at its inception, might become clothed with a public interest justifying some government regulation, by coming "to hold such a peculiar relation to the public that this is superimposed" upon it. This, I think, is the case here.

RIBNIK v. Mc BRIDE.

Supreme Court of the United States. 1928.
277 U.S. 350.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

Chapter 227, Laws of New Jersey, 1918, p. 822, requires that every person operating an employment agency must procure a license from the Commissioner of Labor. . . . The applicant must "file with the Commissioner of Labor, for his approval, a schedule of fees proposed to be charged. . . . The schedule of fees may be changed only with the approval of the Commissioner of Labor."

Plaintiff in error filed with the state Commissioner of Labor a written application for a license to conduct an employment agency. All conditions of the statute were complied with; but the commissioner rejected the application upon the sole ground that, in his opinion, the fees proposed to be charged were excessive and unreasonable. . . .

That the state has power to require a license and regulate the business of an employment agent does not admit of doubt. But the question here presented is whether the due process of law clause is contravened by the legislation attempting to confer upon the Commissioner of Labor power to fix the prices which the employment agent shall charge for his services. The question calls for an answer under the last of the three categories set forth by this Court in *Wolff Co. v. Industrial Court*, 262 U.S. 522, 535, that is to say: Has the business in question been devoted to a public use and an interest in effect granted to the public in that use? Or, in other words, is the business one "affected with a public

interest," within the meaning of that phrase as heretofore defined by this Court? As was recently pointed out in *Tyson & Brother v. Banton*, 273 U.S. 418, 430, the phrase is not capable of exact definition; but, nevertheless, under all the decisions of this Court from *Munn v. Illinois*, 94 U.S. 113, it is the standard by which the validity of price-fixing legislation, in respect of a business like that here under consideration, must be tested. . . .

The business of securing employment for those seeking work and employees for those seeking workers is essentially that of a broker, that is, of an intermediary. While we do not undertake to say that there may not be a deeper concern on the part of the public in the business of an employment agency, that business does not differ in substantial character from the business of a real estate broker, ship broker, merchandise broker or ticket broker. . . .

An employment agency is essentially a private business. True, it deals with the public, but so do the druggist, the butcher, the baker, the grocer, and the apartment or tenement house owner and the broker who acts as intermediary between such owner and his tenants. Of course, anything which substantially interferes with employment is a matter of public concern, but in the same sense that interference with the procurement of food and housing and fuel are of public concern. The public is deeply interested in all these things. The welfare of its constituent members depends upon them. The interest of the public in the matter of employment is not different in quality or character from its interest in the other things enumerated; but in none of them is the interest that "public interest" which the law contemplates as the basis for legislative price control. . . . Under the decisions of this Court it is no longer fairly open to question that, at least in the absence of a grave emergency, . . . the fixing of prices for food or clothing, of house rental or of wages to be paid, whether minimum or maximum, is beyond the legislative power. And we perceive no reason for applying a different rule in the case of legislation for controlling prices to be paid for services rendered in securing a place for an employee or an employee for a place. . . .

To urge that extortion, fraud, imposition, discrimination and the like have been practiced to some, or to a great, extent in connection with the business here under consideration, or that the business is one lending itself peculiarly to such evils, is simply to restate grounds already fully considered by this Court. These are grounds for regulation but not for price-fixing, as we have already definitely decided. . . .

MR. JUSTICE SANFORD, concurring. . . .

MR. JUSTICE STONE, dissenting.

Under the decisions of this Court not all price regulation, as distinguished from other forms of regulation, is forbidden. As those decisions have been explained, price regulation is within the constitutional power of a state legislature when the business concerned is "affected with a public interest." That phrase is not to be found in the Constitution. Concededly it is incapable of any precise definition. It has and can have only such meaning as may be given to it by the decisions of this Court. As I read those decisions, such regulation is within a state's power whenever any combination of circumstances seriously curtails the regulative force of competition, so that buyers or sellers are placed at such a disadvantage in the bargaining struggle that a legislature might reasonably anticipate serious consequences to the community as a whole. . . . The price regulation may embrace businesses "which though not public in their inception may fairly be said to have risen to be such and have become subject in consequence to some governmental regulation." *Wolff Co. v. Industrial Court*, 262 U.S. 522, 535. The use by the public generally of the specific thing or business affected is not the test. The nature of the service rendered, the exorbitance of the charges and the arbitrary control to which the public may be subjected without regulation, are elements to be considered in determining whether the "public interest" exists. . . . The economic disadvantage of a class and the attempt to ameliorate its condition may alone be sufficient to give rise to the "public interest" and to justify the regulation of contracts with its members, *Knoxville Iron Co. v. Harbison*, [183 U.S. 13]; *McLean v. Arkansas*, [211 U.S. 539]; *Mutual Loan Co. v. Martell*, [222 U.S. 225], and obviously circumstances may so change in point of time or so differ in space as to clothe a business with such an interest which at other times or in other places would be a matter purely of private concern. . . .

In dealing with the question of power to require reasonable prices in this particular business, we should remember what was specifically pointed out by the Court in *Tyson v. Banton*, 273 U.S. 418, 438, that whether a business is affected with a "public interest" turns "upon the existence of conditions, peculiar to the business under consideration." In the respects mentioned, or most of them, and in others to be pointed out, it seems to me that there is a marked difference between the character of this business and that of real estate brokers, ship brokers, merchandise brokers, and, more than all, of ticket brokers, who were involved in *Tyson v. Banton*, *supra*. There the attempt was made to limit the advance which brokers might charge over box office prices for theatre tickets, an expedient adopted to break up their monopolistic control of a luxury, not a necessity. Those affected by the practice of the ticket brokers constituted a relatively small part of the population

within a comparatively small area of the State of New York. They were not necessitous. The consequences of the fraud and extortion practiced upon them were not visited upon the community as a whole in any such manner as are fraud and imposition practiced upon workers seeking employment. Here the effort is made . . . first, to protect from abuses a class unable to protect itself, for whose welfare the police power has often been allowed broad play, and, second, to mitigate the evils which unemployment brings upon the community as a whole.

Some presumption should be indulged that the New Jersey legislature had an adequate knowledge of such local conditions as the circumstances of those seeking employment, the number and distribution of employment agencies, the local efficacy of competition, the prevalent practices with respect to fees. On this deserved respect for the judgment of the local lawmaker depends, of course, the presumption in favor of constitutionality. . . . Moreover, we should not, when the matter is not clear, oppose our notion of the seriousness of the problem or the necessity of the legislation to that of local tribunals. . . . If, therefore, our consideration of the general conditions surrounding employment agencies, which it was thought in *Brazee v. Michigan*, [241 U.S. 340], made them subject to regulation, was to go no further than that of the Court, I should still have supposed that plaintiff in error had not sustained the burden which rests on him to show that this law is unconstitutional. . . . But even if the presumption is not to be indulged, and the burden no longer to be cast on him who attacks the constitutionality of a law, we need not close our eyes to available data throwing light on the problem with which the legislature had to deal. See *Muller v. Oregon*, 208 U. S. 412, 420-421; *McLean v. Arkansas*, [211 U.S. 539,] 549.

I cannot accept as valid the distinction on which the opinion of the majority seems to me necessarily to depend; that granted constitutional power to regulate there is any controlling difference between reasonable regulations of price, if appropriate to the evil to be remedied, and other forms of appropriate regulation which curtail liberty of contract or the use and enjoyment of property. Obviously, . . . other control than price regulation may be appropriate, and price regulation may be so inappropriate as to be arbitrary or unreasonable, and hence unconstitutional. To me it seems equally obvious that the Constitution does not require us to hold that a business, subject to every other form of reasonable regulation, is immune from the requirement of reasonable prices, where that requirement is the only remedy appropriate to the evils encountered. In this respect I can see no difference between a reasonable regulation of price and a reasonable regulation of the use of property, which affects its prices or economic return. The privilege of contract

and the free use of property are as seriously cut down in the one case as in the other. . . .

The price paid for property or services is only one of the terms of a bargain; the effect on the parties is similar whether the restriction on the power to contract affects the price, or the goods or services sold. Apart from the cases involving the historic public-callings, immemorially subject to the closest regulation, this Court has sustained regulations of the price in cases where the legislature fixed the charges which grain elevators, and insurance companies might make ; or required miners to be paid per ton of coal unscreened instead of screened ; or required employers who paid their men in store orders to redeem them in cash ; or fixed the fees chargeable by attorneys before workmen's compensation commissions ; or fixed the rate of pay for overtime work ; or fixed the time within which the services of employees must be paid for ; or established maximum rents ; or fixed the maximum rate of interest chargeable on loans. . . . It has sustained restrictions on the other element in the bargain where legislatures have established maximum hours of labor for men, or for women ; or prohibited the payment of wages in advance ; or required loaves of bread to be of a certain size. . . . In each of these cases the police power of the state was held broad enough to warrant an interference with free bargaining in cases where, despite the competition that ordinarily attends that freedom, serious evils persisted.

Similar evils are now observed in the conduct of employment agencies. I see no reason why a state may not resort to the same remedy. There may be reasonable differences of opinion as to the wisdom of the solution here attempted. These I would be the first to admit. But a choice between them involves a step from the judicial to the legislative field. . . . That choice should be left where, it seems to me, it was left by the Constitution—to the States and to Congress.

MR. JUSTICE HOLMES and MR. JUSTICE BRANDEIS join in this dissent.

NEW STATE ICE CO. *v.* LIEBMANN.

Supreme Court of the United States. 1932.
285 U.S. 262.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

The New State Ice Company, engaged in the business of manufacturing, selling, and distributing ice under a license or permit duly issued

by the Corporation Commission of Oklahoma, brought this suit against Liebmann to enjoin him from manufacturing, selling, and distributing ice within Oklahoma City without first having obtained a like license or permit from the commission. The license or permit is required by an act of the Oklahoma Legislature, chapter 147, Session Laws 1925. . . .

Section 3 of the act provides:

"That the Corporation Commission shall not issue license to any persons except upon a hearing had by said Commission at which said hearing, competent testimony and proof shall be presented showing the necessity for the manufacture, sale or distribution of ice at the point desired. If the facts proved at said hearing disclose that the facilities for the manufacture, sale and distribution of ice by some person already licensed by said Commission at said point are sufficient to meet the public needs therein, the said Corporation Commission may refuse and deny the applicant for said license"

It must be conceded that all businesses are subject to some measure of public regulation. And that the business of manufacturing, selling, or distributing ice, like that of the grocer, the dairyman, the butcher, or the baker, may be subjected to appropriate regulations in the interest of the public health cannot be doubted; but the question here is whether the business is so charged with a public use as to justify the particular restriction above stated. If this legislative restriction be within the constitutional power of the state Legislature, it follows that the license or permit, issued to appellant, constitutes a franchise, to which a court of equity will afford protection against one who seeks to carry on the same business without obtaining from the commission a license or permit to do so. *Frost v. Corporation Commission*, 278 U.S. 515, 519-521. . . .

The *Frost* case is relied on here. That case dealt with the business of operating a cotton gin. It was conceded that this was a business clothed with a public interest, and that the statute requiring a showing of public necessity as a condition precedent to the issue of a permit was valid. But the conditions which warranted the concession there are wholly wanting here. It long has been recognized that mills for the grinding of grain or performing similar services for all comers are devoted to a public use and subject to public control, whether they be operated by direct authority of the state or entirely upon individual initiative. . . .

In that connection we also may consider *Clark v. Nash*, 198 U.S. 361 and *Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527. . . .

In the *Nash* case, this court sustained the condemnation of

a right of way across the lands of one private owner for a ditch to convey water for the purpose of irrigating the lands of another private owner. The decision was rested explicitly upon the existence of conditions peculiar to the state. . . .

This was followed in the *Strickley* case, where, mining being one of the chief industries of the state and its development peculiarly important for the public welfare, the condemnation of a right of way for an aerial bucket line across private lands, for the purpose of transporting ores from a mine in private ownership, was upheld. . . .

These cases, though not strictly analogous, furnish persuasive ground for upholding the declaration of the Oklahoma legislature in respect of the public nature of cotton gins in that state. The production of cotton is the chief industry of the State of Oklahoma, and is of such paramount importance as to justify the assertion that the general welfare and prosperity of the state in a very large and real sense depend upon its maintenance. . . . The cotton gin bears the same relation to the cotton grower that the old grist mill did to the grower of wheat. . . . These considerations render it not unreasonable to conclude that the business "has been devoted to a public use and its use thereby, in effect, granted to the public." *Tyson & Bro. v. Banton*, 273 U.S. 418, 434; *Wolff Co. v. Industrial Court*, 262 U.S. 522, 535, 538; same case, 267 U.S. 552, 563, *et seq.*

We have thus, with some particularity, discussed the circumstances which, so far as the State of Oklahoma is concerned, afford ground for sustaining the legislative pronouncement that the business of operating cotton gins is charged with a public use; in order to put them in contrast with the completely unlike circumstances which attend the business of manufacturing, selling and distributing ice. Here we are dealing with an ordinary business, not with a paramount industry upon which the prosperity of the entire state in large measure depends. It is a business as essentially private in its nature as the business of the grocer, the dairyman, the butcher, the baker, the shoemaker, or the tailor, each of whom performs a service which, to a greater or less extent, the community is dependent upon and is interested in having maintained; but which bears no such relation to the public as to warrant its inclusion in the category of businesses charged with a public use. It may be quite true that in Oklahoma ice is not only an article of prime necessity, but indispensable; but certainly not more so than food or clothing or the shelter of a home. And this court has definitely said that the production or sale of food or clothing cannot be subjected to legislative regulation on the basis of a public use; and that the same is true in respect of the business of renting houses and apartments, except as to temporary measures to tide over grave emergencies. See *Tyson &*

Bro. v. Banton, *supra*, pp. 437-438, and cases cited.

It has been said that the manufacture of ice requires an expensive plant beyond the means of the average citizen, and that since the use of ice is indispensable, patronage of the producer by the consumer is unavoidable. The same might, however, be said in respect of other articles clearly beyond the reach of a restriction like that here under review. But, for the moment conceding the materiality of the statement, it is not now true, whatever may have been the fact in the past. We know, since it is common knowledge, that today, to say nothing of other means, wherever electricity or gas is available (and one or the other is available in practically every part of the country), anyone for a comparatively moderate outlay may have set up in his kitchen an appliance by means of which he may manufacture ice for himself. Under such circumstances it hardly will do to say that people generally are at the mercy of the manufacturer, seller and distributor of ice for ordinary needs. Moreover, the practical tendency of the restriction, as the trial court suggested in the present case, is to shut out new enterprises, and thus create and foster monopoly in the hands of existing establishments, against, rather than in aid of, the interest of the consuming public.

Plainly, a regulation which has the effect of denying or unreasonably curtailing the common right to engage in a lawful private business, such as that under review, cannot be upheld consistently with the Fourteenth Amendment. Under that amendment, nothing is more clearly settled than that it is beyond the power of a state, "under the guise of protecting the public, arbitrarily [to] interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them." *Burns Baking Co. v. Bryan*, 264 U.S. 504, 513, and authorities cited; *Liggett Co. v. Baldridge*, 278 U.S. 105, 113.

Stated succinctly, a private corporation here seeks to prevent a competitor from entering the business of making and selling ice. It claims to be endowed with state authority to achieve this exclusion. There is no question now before us of any regulation by the state to protect the consuming public either with respect to conditions of manufacture and distribution or to insure purity of product or to prevent extortion. The control here asserted does not protect against monopoly, but tends to foster it. The aim is not to encourage competition, but to prevent it; not to regulate the business, but to preclude persons from engaging in it. . . . We are not able to see anything peculiar in the business here in question which distinguishes it from ordinary manufacture and production. It is said to be recent; but it is the character of the business and not the date when it began that is determinative. It is

not the case of a natural monopoly, or of an enterprise in its nature dependent upon the grant of public privileges. . . . Nor is it a case of the protection of natural resources. . . .

And it is plain that unreasonable or arbitrary interference or restrictions cannot be saved from the condemnation of that Amendment merely by calling them experimental. It is not necessary to challenge the authority of the states to indulge in experimental legislation; but it would be strange and unwarranted doctrine to hold that they may do so by enactments which transcend the limitations imposed upon them by the federal Constitution. The principle is embedded in our constitutional system that there are certain essentials of liberty with which the state is not entitled to dispense in the interest of experiments. This principle has been applied by this court in many cases. . . .

MR. JUSTICE CARDOZO took no part in the consideration or decision of this case.

MR. JUSTICE BRANDEIS, dissenting.

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First. The Oklahoma statute makes entry into the business of manufacturing ice for sale and distribution dependent, in effect, upon a certificate of public convenience and necessity. Such a certificate was unknown to the common law. It is a creature of the machine age, in which plants have displaced tools and businesses are substituted for trades. The purpose of requiring it is to promote the public interest by preventing waste. Particularly in those businesses in which interest and depreciation charges on plant constitute a large element in the cost of production, experience has taught that the financial burdens incident to unnecessary duplication of facilities are likely to bring high rates and poor service. There, cost is usually dependent, among other things, upon volume; and division of possible patronage among competing concerns may so raise the unit cost of operation as to make it impossible to provide adequate service at reasonable rates. The introduction in the United States of the certificate of public convenience and necessity marked the growing conviction that under certain circumstances free competition might be harmful to the community and that, when it was so, absolute freedom to enter the business of one's choice should be denied. . . .

Second. Oklahoma declared the business of manufacturing ice for sale and distribution a "public business;" that is, a public utility. So far as it appears, it was the first State to do so. Of course, a legislature cannot by mere legislative fiat convert a business into a public utility. . . .

But the conception of a public utility is not static. The welfare of the community may require that the business of supplying ice be made a public utility, as well as the business of supplying water or any other necessary commodity or service. If the business is, or can be made, a public utility, it must be possible to make the issue of a certificate a prerequisite to engaging in it.

Whether the local conditions are such as to justify converting a private business into a public one is a matter primarily for the determination of the state legislature. Its determination is subject to judicial review; but the usual presumption of validity attends the enactment. The action of the State must be held valid unless clearly arbitrary, capricious or unreasonable. . . . Whether the grievances are real or fancied, whether the remedies are wise or foolish, are not matters about which the Court may concern itself. . . . A decision that the legislature's belief of evils was arbitrary, capricious and unreasonable may not be made without enquiry into the facts with reference to which it acted.

Third. Liebmann challenges the statute—not an order of the Corporation Commission. . . . Liebmann rests his defense upon the broad claim that the Federal Constitution gives him the right to enter the business of manufacturing ice for sale even if his doing so be found by the properly constituted authority to be inconsistent with the public welfare. He claims that, whatever the local conditions may demand, to confer upon the Commission power to deny that right is an unreasonable, arbitrary and capricious restraint upon his liberty.

The function of the Court is primarily to determine whether the conditions in Oklahoma are such that the legislature could not reasonably conclude (1) that the public welfare required treating the manufacture of ice for sale and distribution as a "public business"; and (2) that in order to ensure to the inhabitants of some communities an adequate supply of ice at reasonable rates it was necessary to give the Commission power to exclude the establishment of an additional ice plant in places where the community was already well served. Unless the Court can say that the Federal Constitution confers an absolute right to engage anywhere in the business of manufacturing ice for sale, it cannot properly decide that the legislators acted unreasonably without first ascertaining what was the experience of Oklahoma in respect to the ice business. . . .

Nor can the Court properly take judicial notice that, in Oklahoma, the means of manufacturing ice for private use are within the reach of all persons who are dependent upon it. Certainly it has not been so. In 1925 domestic mechanical refrigeration had scarcely emerged from the experimental stage. . . . In Oklahoma the mechanical household refrigerator is still an article of relative luxury. Legislation essential to

the protection of individuals of limited or no means is not invalidated by the circumstance that other individuals are financially able to protect themselves. . . . The question whether in Oklahoma the means of securing refrigeration otherwise than by ice manufactured for sale and distribution has become so general as to destroy popular dependence upon ice plants is one peculiarly appropriate for the determination of its legislature and peculiarly inappropriate for determination by this Court, which cannot have knowledge of all the relevant facts.

The business of supplying ice is not only a necessity, . . . but the legislature could also consider that it is one which lends itself peculiarly to monopoly. . . . Competition in the industry tends to be destructive because ice plants have a determinate capacity, and inflexible fixed charges and operating costs, and because in a market of limited area the volume of sales is not readily expanded.

* * * * *

Fifth. The claim is that manufacturing ice for sale and distribution is a business inherently private, and, in effect, that no state of facts can justify denial of the right to engage in it. To supply one's self with water, electricity, gas, ice or any other article, is inherently a matter of private concern. So also may be the business of supplying the same articles to others, for compensation. But the business of supplying to others, for compensation, any article or service whatsoever may become a matter of public concern. Whether it is, or is not, depends upon the conditions existing in the community affected. If it is a matter of public concern, it may be regulated, whatever the business.

A regulation valid for one kind of business may, of course, be invalid for another; since the reasonableness of every regulation is dependent upon the relevant facts. But so far as concerns the power to regulate, there is no difference in essence, between a business called private and one called a public utility or said to be "affected with a public interest." Whatever the nature of the business, whatever the scope or character of the regulation applied, the source of the power invoked is the same. And likewise the constitutional limitation upon that power. The source is the police power. The limitation is that set by the due process clause, which, as construed, requires that the regulation shall not be unreasonable, arbitrary or capricious; and that the means of regulation selected shall have a real or substantial relation to the object sought to be obtained. The notion of a distinct category of business "affected with a public interest," employing property "devoted to a public use," rests upon historical error. The consequences which it is sought to draw from those phrases are belied by the meaning in which they were first used centuries ago, and by the decision of this Court, in *Munn v. Illinois*, 94 U.S. 113, which first introduced

them into the law of the Constitution. In my opinion the true principle is that the State's power extends to every regulation of any business reasonably required and appropriate for the public protection. I find in the due process clause no other limitation upon the character or the scope of regulation permissible.

Sixth. It is urged specifically that manufacturing ice for sale and distribution is a common calling; and that the right to engage in a common calling is one of the fundamental liberties guaranteed by the due process clause. To think of the ice-manufacturing business as a common calling is difficult; so recent is it in origin and so peculiar in character. Moreover, the Constitution does not require that every calling which has been common shall ever remain so. The liberty to engage in a common calling, like other liberties, may be limited in the exercise of the police power. . . .

It is settled that the police power commonly invoked in aid of health, safety and morals, extends equally to the promotion of the public welfare. . . . Upon this principle is based our whole modern practice of public utility regulation. It is no objection to the validity of the statute here assailed that it fosters monopoly. That, indeed, is its design. The certificate of public convenience and invention is a device—a recent social-economic invention—through which the monopoly is kept under effective control by vesting in a commission the power to terminate it whenever that course is required in the public interest. To grant any monopoly to any person as a favor is forbidden even if terminable. But where, as here, there is reasonable ground for the legislative conclusion that in order to secure a necessary service at reasonable rates, it may be necessary to curtail the right to enter the calling, it is, in my opinion, consistent with the due process clause to do so, whatever the nature of the business. The existence of such power in the legislature seems indispensable in our ever-changing society. . . .

Seventh. The economic emergencies of the past were incidents of scarcity. . . .

Eighth. The people of the United States are now confronted with an emergency more serious than war. Misery is wide-spread, in a time, not of scarcity, but of over-abundance. The long-continued depression has brought unprecedented unemployment, a catastrophic fall in commodity prices and a volume of economic losses which threatens our financial institutions. Some people believe that the existing conditions threaten even the stability of the capitalistic system. Economists are searching for the causes of this disorder and are reëxamining the bases of our industrial structure. Business men are seeking possible remedies. Most of them realize that failure to distribute widely the profits of industry has been a prime cause of our present plight. But rightly or

wrongly, many persons think that one of the major contributing causes has been unbridled competition. Increasingly, doubt is expressed whether it is economically wise, or morally right, that men should be permitted to add to the producing facilities of an industry which is already suffering from over-capacity. . . .

Whether that view is sound nobody knows. . . . The economic and social sciences are largely uncharted seas. . . .

Yet the advances in the exact sciences and the achievements in invention remind us that the seemingly impossible sometimes happens. . . . Some people assert that our present plight is due, in part, to the limitations set by courts upon experimentation in the fields of social and economic science; and to the discouragement to which proposals for betterment there have been subjected otherwise. There must be power in the States and the Nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs. I cannot believe that the framers of the Fourteenth Amendment, or the States which ratified it, intended to deprive us of the power to correct the evils of technological unemployment and excess productive capacity which have attended progress in the useful arts.

To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if the citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious or unreasonable. We have power to do this, because the due process clause has been held by the Court applicable to matters of substantive law as well as to matters of procedure. But in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold.

MR. JUSTICE STONE joins in this opinion.⁸

⁸ The majority in this case was composed of Hughes, C. J.; Van Devanter, McReynolds, Sutherland, Butler, Roberts, JJ.—Ed.

Labor and Liberty of Contract

HOLDEN v. HARDY.

Supreme Court of the United States. 1898.

169 U.S. 366.

[The legislature of the State of Utah enacted an eight hour day for workmen in underground mines, smelters, and similar places for the reduction of ore and metals, except in the event of an emergency. Violation of the statute was made a misdemeanor. Plaintiff in error was convicted of employing men contrary to the terms of the statute.]

MR. JUSTICE BROWN delivered the opinion of the court. . . .

The validity of the statute in question is challenged upon the ground of an alleged violation of the Fourteenth Amendment to the Constitution of the United States, in that it abridges the privileges or immunities of citizens of the United States; deprives both the employer and the laborer of his property without due process of law, and denies to them the equal protection of the laws. . . .

The latest utterance of the court upon this subject is contained in the case of *Allgeyer v. Louisiana*, 165 U.S. 578, 591, in which it was held that an act of Louisiana which prohibited individuals within the State from making contracts of insurance with corporations doing business in New York, was a violation of the Fourteenth Amendment. In delivering the opinion of the court, Mr. Justice Peckham remarked: "In the privilege of pursuing an ordinary calling or trade, and of acquiring, holding, and selling property, must be embraced the right to make all proper contracts in relation thereto, and, although it may be conceded that this right to contract in relation to persons or property or to do business within the jurisdiction of the State, may be regulated and sometimes prohibited, when the contracts or business conflict with the policy of the State as contained in its statutes, yet the power does not and cannot extend to prohibiting a citizen from making contracts of the nature involved in this case outside of the limits and jurisdiction of the State, and which are also to be performed outside of such jurisdiction."

This right of contract, however, is itself subject to certain limitations which the State may lawfully impose in the exercise of its police powers. While this power is inherent in all governments, it has doubtless been greatly expanded in its application during the past century,

owing to an enormous increase in the number of occupations which are dangerous, or so far detrimental to the health of employ  s as to demand special precautions for their well-being and protection, or the safety of adjacent property. . . .

While this power is necessarily inherent in every form of government, it was, prior to the adoption of the Constitution, but sparingly used in this country. As we were then almost purely an agricultural people, the occasion for any special protection of a particular class did not exist. Certain profitable employments, such as lotteries and the sale of intoxicating liquors, which were then considered to be legitimate, have since fallen under the ban of public opinion, and are now either altogether prohibited or made subject to stringent police regulations. . . .

. . . . In States where manufacturing is carried on to a large extent, provision is made for the protection of dangerous machinery against accidental contact, for the cleanliness and ventilation of working rooms, for the guarding of well holes, stairways, elevator shafts and for the employment of sanitary appliances. In others, where mining is the principal industry, special provision is made for the shoring up of dangerous walls, for ventilation shafts, bore holes, escapement shafts, means of signalling the surface, for the supply of fresh air and the elimination, as far as possible, of dangerous gases, for safe means of hoisting and lowering cages, for a limitation upon the number of persons permitted to enter a cage, that cages shall be covered, and that there shall be fences and gates around the top of shafts, besides other similar precautions. . . .

But if it be within the power of a legislature to adopt such means for the protection of the lives of its citizens, it is difficult to see why precautions may not also be adopted for the protection of their health and morals. It is as much for the interest of the State that the public health should be preserved as that life should be made secure. With this end in view quarantine laws have been enacted in most if not all of the States; . . . and special measures taken for the exclusion of infected cattle, rags, and decayed fruit. In other States laws have been enacted limiting the hours during which women and children shall be employed in factories; and while their constitutionality, at least as applied to women, has been doubted in some of the States, they have been generally upheld. Thus, in the case of *Commonwealth v. Hamilton Manufacturing Co.*, 120 Mass. 383. . . .

Upon the principles above stated, we think the act in question may be sustained as a valid exercise of the police power of the State. The enactment does not profess to limit the hours of all workmen, but merely those who are employed in underground mines, or in the smelting, reduction, or refining of ores and metals. These employments,

when too long pursued, the legislature has judged to be detrimental to the health of the employés, and, so long as there are reasonable grounds for believing that this is so, its decision upon this subject cannot be reviewed by the Federal courts.

While the general experience of mankind may justify us in believing that men may engage in ordinary employment more than eight hours per day without injury to their health, it does not follow that labor for the same length of time is innocuous when carried on beneath the surface of the earth, where the operative is deprived of fresh air and sunlight, and is frequently subjected to foul atmosphere and a very high temperature, or to the influence of noxious gases, generated by the processes of refining or smelting. . . .

MR. JUSTICE BREWER and MR. JUSTICE PECKHAM dissented.

LOCHNER *v.* NEW YORK.

Supreme Court of the United States. 1905.
198 U.S. 45.

[The legislature of the State of New York enacted a ten hour day and a sixty hour week for workmen in bakeries, except that the work-day might be lengthened in order to shorten the last workday of the week. Defendant was convicted of employing labor in violation of the statute.]

MR. JUSTICE PECKHAM delivered the opinion of the court.

The statute necessarily interferes with the right of contract between the employer and employés, concerning the number of hours in which the latter may labor in the bakery of the employer. The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution. *Allgeyer v. Louisiana*, 165 U.S. 578. . . .

The State has power to prevent the individual from making certain kinds of contracts, and in regard to them the Federal Constitution offers no protection. If the contract be one which the State, in the legitimate exercise of its police power, has the right to prohibit, it is not prevented from prohibiting it by the Fourteenth Amendment. Contracts in violation of a statute, either of the Federal or State government, or a contract to let one's property for immoral purposes, or to do any other unlawful act, could obtain no protection from the Fed-

eral Constitution, as coming under the liberty of person or of free contract. Therefore, when the State, by its legislature, in the assumed exercise of its police powers, has passed an act which seriously limits the right to labor or the right of contract in regard to their means of livelihood between persons who are *sui juris* (both employer and employé), it becomes of great importance to determine which shall prevail—the right of the individual to labor for such time as he may choose, or the right of the State to prevent the individual from laboring or from entering into contract to labor, beyond a certain time prescribed by the State.

This court has recognized the existence and upheld the exercise of the police powers of the States in many cases which might fairly be considered as border ones, and it has, in the course of its determination of questions regarding the asserted invalidity of such statutes, on the ground of their violation of the rights secured by the Federal Constitution, been guided by rules of a very liberal nature, the application of which has resulted, in numerous instances, in upholding the validity of state statutes thus assailed. . . .

It must, of course, be conceded that there is a limit to the valid exercise of the police power by the State. . . . In every case that comes before this court, therefore, where legislation of this character is concerned and where the protection of the Federal Constitution is sought, the question necessarily arises: Is this a fair, reasonable and appropriate exercise of the police power of the State, or is it an unreasonable and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family? Of course the liberty of contract relating to labor includes both parties to it. The one has as much right to purchase as the other to sell labor.

This is not a question of substituting the judgment of the court for that of the legislature.⁴ If the act be within the power of the State it is valid, although the judgment of the court might be totally opposed to the enactment of such a law. But the question would still remain: Is it within the police power of the State? and that question must be answered by the court.

The question whether this act is valid as a labor law, pure and

⁴ The student should note this assertion. It occurs often in dissent as an accusation against the majority opinion, and it is now and then stated as a repudiation by a majority justice. In the present case, it has been clear both to lawyers and to laymen that the five majority justices were in fact substituting their judgment for that of the legislature in holding that conditions in bakeries were *not* such as to undermine the health of those working in them. Yet the sincerity of Mr. Justice Peckham in making the assertion is not to be doubted.—Ed.

simple, may be dismissed in a few words. There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker. . . . The law must be upheld, if at all, as a law pertaining to the health of the individual engaged in the occupation of a baker. Clean and wholesome bread does not depend upon whether the baker works but ten hours per day or only sixty hours a week. The limitation of the hours of labor does not come within the police power on that ground. . . .

This case has caused much diversity of opinion in the state courts. In the Supreme Court two of the five judges composing the Appellate Division dissented from the judgment affirming the validity of the act. In the Court of Appeals three of the seven judges also dissented from the judgment upholding the statute. . . .

We think the limit of the police power has been reached and passed in this case. There is, in our judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law to safeguard the public health or the health of the individuals who are following the trade of a baker. If this statute be valid, and if, therefore, a proper case is made out in which to deny the right of an individual, *sui juris*, as employer or employé to make contracts for the labor of the latter under the protection of the provisions of the Federal Constitution, there would seem to be no length to which legislation of this nature might not go. . . .

We think that there can be no fair doubt⁵ that the trade of a baker, in and of itself, is not an unhealthy one to that degree which would authorize the legislature to interfere with the right to labor, and with the right of free contract on the part of the individual, either as employer or employé. In looking through statistics regarding all trades and occupations, it may be true that the trade of a baker does not appear to be as healthy as some other trades, and is also vastly more healthy than still others. To the common understanding the trade of a baker has never been regarded as an unhealthy one. Very likely physicians would not recommend the exercise of that or of any other trade as a remedy for ill health. . . . It might be safely affirmed that almost all occupations more or less affect the health. . . . But are we all, on that account, at the mercy of legislative majorities? . . .

Statutes of the nature of that under review, limiting the hours in which grown and intelligent men may labor to earn their living, are mere meddlesome interferences with the rights of the individual, and they are not saved from condemnation by the claim that they are

⁵ Since this is a five to four decision, the student should note also this statement for its light on the judicial process.—Ed.

passed in the exercise of the police power and upon the subject of the health of the individual whose rights are interfered with, unless there be some fair ground, reasonable in and of itself, to say that there is material danger to the public health or to the health of the employes, if the hours of labor are not curtailed. If this be not clearly the case the individuals, whose rights are thus made the subject of legislative interference, are under the protection of the Federal Constitution regarding their liberty of contract as well as of person; and the legislature of the State has no power to limit their right as proposed in this statute. . . .

It is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed from other motives. We are justified in saying so when, from the character of the law and the subject upon which it legislates, it is apparent that the public health or welfare bears but the most remote relation to the law. The purpose of a statute must be determined from the natural and legal effect of the language employed; and whether it is or is not repugnant to the Constitution of the United States must be determined from the natural effect of such statutes when put into operation, and not from their proclaimed purpose. . . .

MR. JUSTICE HARLAN, with whom MR. JUSTICE WHITE and MR. JUSTICE DAY concurred, dissenting. . . .

I find it impossible, in view of common experience, to say that there is here no real or substantial relation between the means employed by the State and the end sought to be accomplished by its legislation. . . .

We judicially know that the question of the number of hours during which a workman should continuously labor has been, for a long period, and is yet, a subject of serious consideration among civilized peoples, and by those having special knowledge of the laws of health. . . . What is the true ground for the State to take between legitimate protection, by legislation, of the public health and liberty of contract is not a question easily solved, nor one in respect of which there is or can be absolute certainty. There are very few, if any, questions in political economy about which entire certainty may be predicated. . . .

I do not stop to consider whether any particular view of this economic question presents the sounder theory. What the precise facts are it may be difficult to say. It is enough for the determination of this

case, and it is enough for this court to know, that the question is one about which there is room for debate and for an honest difference of opinion. There are many reasons of a weighty, substantial character, based upon the experience of mankind, in support of the theory that, all things considered, more than ten hours steady work each day, from week to week, in a bakery or confectionary establishment, may endanger the health and shorten the lives of the workmen, thereby diminishing their physical and mental capacity to serve the State and to provide for those dependent upon them.

If such reasons exist that ought to be the end of this case, for the State is not amenable to the judiciary, in respect of its legislative enactments, unless such enactments are plainly, palpably, beyond all question, inconsistent with the Constitution of the United States. . . .

MR. JUSTICE HOLMES, dissenting. . . .

This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious or if you will as tyrannical as this, and which equally with this interfere with the liberty to contract. Sunday laws and usury laws are ancient examples. A more modern one is the prohibition of lotteries. The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the Post Office, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not.

The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics. The other day we sustained the Massachusetts vaccination law United States and state statutes and decisions cutting down the liberty to contract by way of combination are familiar to this court. . . . Two years ago we upheld the prohibition of sales of stock on margins or for future delivery in the constitution of California. . . . The decision sustaining an eight-hour law for minors is still recent. . . . Some of these laws embody convictions or prejudices which judges are likely to share. Some may not. But a constitution is not intended to embody a particular economic theory, whether

of paternalism and the organic relation of the citizen to the State or of laissez faire. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.

General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise. But I think that the proposition just stated, if it is accepted, will carry us far toward the end. Every opinion tends to become a law. I think that the word "liberty" in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law. It does not need research to show that no such sweeping condemnation can be passed upon the statute before us. A reasonable man might think it a proper measure on the score of health. Men whom I certainly could not pronounce unreasonable would uphold it as a first instalment of a general regulation of the hours of work. Whether in the latter aspect it would be open to the charge of inequality I think it unnecessary to discuss.

BUNTING *v.* OREGON.

Supreme Court of the United States. 1917.
243 U.S. 426.

[The legislature of the State of Oregon enacted a ten hour day for all persons "employed in any mill, factory or manufacturing establishment, except watchmen and employees when engaged in making necessary repairs, or in case of emergency." The law provided further that employes might work up to three hours overtime, on condition that they draw pay at the rate of time and a half, for the period over the prescribed number of hours. Bunting was convicted of having employed a workman thirteen hours in one day without paying him the statutory rate for overtime.]

MR. JUSTICE MCKENNA delivered the opinion of the court. . . .

The consonance of the Oregon law with the Fourteenth Amendment is the question in the case, and this depends upon whether it is a proper exercise of the police power of the State, as the Supreme Court of this State decided that it is.

That the police power extends to health regulations is not denied, but it is denied that the law has such purpose or justification. It is contended that it is a wage law, not a health regulation, and takes the property of plaintiff in error without due process. The contention presents two questions: (1) Is the law a wage law, or an hours of service law? And (2) if the latter, has it equality of operation?

Section 1 of the law expresses the policy that impelled its enactment to be the interest of the State in the physical well-being of its citizens and that it is injurious to their health for them to work "in any mill, factory or manufacturing establishment" more than ten hours in any one day. . . . If, therefore, we take the law at its word there can be no doubt of its purpose, and the Supreme Court of the State has added the confirmation of its decision, by declaring that "the aim of the statute is to fix the maximum hours of service in certain industries. The act makes no attempt to fix the standard of wages. No maximum or minimum wage is named. That is left wholly to the contracting parties."

It is, however, urged that we are not bound by the declaration of the law or the decision of the court. . . . Of course, mere declaration cannot give character to a law nor turn illegal into legal operation, and when such attempt is palpable this court necessarily has the power of review.

But does either the declaration or the decision reach such an extreme? Plaintiff in error, in contending for this and to establish it, makes paramount the provision for overtime; in other words, makes a limitation of the act the extent of the act—indeed, asserts that it gives, besides, character to the act, illegal character.

To assent to this is to ascribe to the legislation such improvidence of expression as to intend one thing and effect another, or artfulness of expression to disguise illegal purpose. We are reluctant to do either and we think all the provisions of the law can be accommodated without doing either. . . .

There is a certain verbal plausibility in the contention that it was intended to permit 13 hours' work if there be 15½ hours pay, but the plausibility disappears upon reflection. The provision for overtime is permissive, in the same sense that any penalty may be said to be permissive. Its purpose is to deter by its burden and its adequacy for this was a matter of legislative judgment under the particular circumstances. It may not achieve its end, but its insufficiency cannot change its character from penalty to permission. . . .

But we need not cast about for reasons for the legislative judgment. We are not required to be sure of the precise reasons for its exercise or be convinced of the wisdom of its exercise. . . . It is enough for

our decision if the legislation under review was passed in the exercise of an admitted power of government; and that it is not as complete as it might be, not as rigid in its prohibitions as might be, gives perhaps evasion too much play, is lighter in its penalties than it might be, is no impeachment of its legality. . . . New policies are usually tentative in their beginnings, advance in firmness as they advance in acceptance. . . .

There is a contention made that the law, even regarded as regulating hours of service, is not either necessary or useful "for preservation of the health of employes in mills, factories and manufacturing establishments." The record contains no facts to support the contention, and against it is the judgment of the legislature and the Supreme Court. . . .

Further discussion we deem unnecessary.

THE CHIEF JUSTICE, MR. JUSTICE VAN DEVANTER and MR. JUSTICE McREYNOLDS, dissent.

MR. JUSTICE BRANDEIS took no part in the consideration and decision of the case.

RADICE v. NEW YORK.

Supreme Court of the United States. 1924.
264 U.S. 292.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

Plaintiff in error was convicted in the City Court of Buffalo upon the charge of having violated the provisions of a statute of the State of New York, prohibiting the employment of women in restaurants in cities of the first and second class, between the hours of ten o'clock at night and 6 o'clock in the morning. . . .

The validity of the statute is challenged upon the ground that it contravenes the provisions of the Fourteenth Amendment, in that it violates (1) the due process clause, by depriving the employer and employee of their liberty of contract, and (2) the equal protection clause, by an unreasonable and arbitrary classification.

1. The basis of the first contention is that the statute unduly and arbitrarily interferes with the liberty of two adult persons to make a contract of employment for themselves. The answer of the State is that night work of the kind prohibited, so injuriously affects the physical condition of women, and so threatens to impair their peculiar

and natural functions, and so exposes them to the dangers and menaces incident to night life in large cities, that a statute prohibiting such work falls within the police power of the State to preserve and promote the public health and welfare.

The legislature had before it a mass of information from which it concluded that night work is substantially and especially detrimental to the health of women. We cannot say that the conclusion is without warrant. The loss of restful night's sleep can not be fully made up by sleep in the day time, especially in busy cities, subject to the disturbances incident to modern life. The injurious consequences were thought by the legislature to bear more heavily against women than men, and, considering their more delicate organism, there would seem to be good reason for so thinking. The fact, assuming it to be such, properly may be made the basis of legislation applicable only to women. . . . Where the constitutional validity of a statute depends upon the existence of facts, courts must be cautious about reaching a conclusion respecting them contrary to that reached by the legislature; and if the question of what the facts establish be a fairly debatable one, it is not permissible for the judge to set up his opinion in respect of it against the opinion of the lawmaker. The state legislature here determined that night employment of the character specified, was sufficiently detrimental to the health and welfare of women engaging in it to justify its suppression; and, since we are unable to say that the finding is clearly unfounded, we are precluded from reviewing the legislative determination. *Holden v. Hardy*, 169 U. S. 366, 395. The language used by this Court in *Muller v. Oregon*, 208 U. S. 412, 422, in respect of the physical limitations of women, is applicable and controlling:

"The limitations which this statute places upon her contractual powers, upon her right to agree with her employer as to the time she shall labor, are not imposed solely for her benefit, but also largely for the benefit of all. Many words cannot make this plainer. The two sexes differ in structure of body, in the functions to be performed by each, in the amount of physical strength, in the capacity for long-continued labor, particularly when done standing, the influence of vigorous health upon the future well-being of the race, the self-reliance which enables one to assert full rights, and in the capacity to maintain the struggle for subsistence. This difference justifies a difference in legislation and upholds that which is designed to compensate for some of the burdens which rest upon her." . . .

2. Nor is the statute vulnerable to the objection that it constitutes a denial of the equal protection of the laws. . . . The inequality produced, in order to encounter the challenge of the Constitution,

must be "actually and palpably unreasonable and arbitrary." *Arkansas Natural Gas Co. v. Ry. Com'n*, 261 U. S. 379, 384. . . .

MOREHEAD v. NEW YORK *ex rel.* TIPALDO.

Supreme Court of the United States. 1936.
298 U.S. 587.

MR. JUSTICE BUTLER delivered the opinion of the Court.

This is a habeas corpus case originating in the Supreme Court of New York. Relator was indicted in the county court of Kings county and sent to jail to await trial upon the charge that as manager of a laundry he failed to obey the mandatory order of the state industrial commissioner prescribing minimum wages for women employees.

The relator's petition for the writ avers that the statute, c. 584 of the Laws of 1933 under which the commissioner made the order, insofar as it purports to authorize him to fix women's wages, is repugnant to the due process clause of the Fourteenth Amendment to the Constitution of the United States. The application for the writ is grounded upon the claim that the state statute is substantially identical with the minimum wage law enacted by Congress for the District of Columbia, 40 Stat. 960, which in 1923 was condemned by this court as repugnant to the due process clause of the Fifth Amendment. *Adkins v. Children's Hospital*, 261 U. S. 525. . . .

The Act extends to women and minors in any "occupation" which "shall mean an industry, trade or business or branch thereof or class of work therein in which women or minors are gainfully employed, but shall not include domestic service in the home of the employer or labor on a farm." It is not an emergency law. It does not regulate hours or any conditions affecting safety or protection of employees. It relates only to wages of adult women and minors. As the record is barren of details in respect of investigation, findings, amounts being paid women workers in laundries or elsewhere prior to the order, or of things done to ascertain the minimum prescribed, we must take it for granted that, if the State is permitted as against employers and their women employees to establish and enforce minimum wages, that power has been validly exerted. . . .

The *Adkins* case, unless distinguishable, requires affirmance of the judgment below. . . . The validity of the principles upon which that decision rests is not challenged. . . .

The District of Columbia Act provided for a board to ascertain and declare "standards of minimum wages" for women in any occupa-

tion and what wages were "inadequate to supply the necessary cost of living to any such women workers to maintain them in good health and to protect their morals."

The New York Act declares it to be against public policy for any employer to employ any woman at an oppressive and unreasonable wage defined as one which is "both less than the fair and reasonable value of the services rendered and less than sufficient to meet the minimum cost of living necessary for health." "A fair wage" is one "fairly and reasonably commensurate with the value of the service or class of service rendered."

And for administrative guidance, the Act declares: "In establishing a minimum fair wage for any service or class of service under this article the commissioner and the wage board without being bound by any technical rules of evidence and procedure (1) may take into account all relevant circumstances affecting the value of the service rendered, and (2) may be guided by like considerations as would guide a court in a suit for the reasonable value of services rendered at the request of an employer without contract as to the amount of the wage to be paid, and (3) may consider the wages paid in the state for work of like or comparable character by employers who voluntarily maintain minimum fair wage standards."

. . . . The New York Act defines an oppressive and unreasonable wage as containing two elements. The one first mentioned is: "less than the fair and reasonable value of the services rendered." The other is: "less than sufficient to meet the minimum cost of living necessary for health." The basis last mentioned is not to be distinguished from the living wage as defined in the District act. . . .

The state court rightly held that the *Adkins* case controls this one and requires that relator be discharged upon the ground that the legislation under which he was indicted and imprisoned is repugnant to the due process clause of the Fourteenth Amendment. . . .

Upon the face of the act the question arises whether the State may impose upon the employers state-made minimum wage rates for all competent experienced women workers whom they may have in their service. That question involves another one. It is: Whether the State has power similarly to subject to state-made wages all adult women employed in trade, industry or business, other than house and farm work. These were the questions decided in the *Adkins* case. . . .

Petitioner [i. e., Morehead, contending for the constitutionality of the Act,] does not attempt to support the Act as construed by the state court. His claim is that it is to be tested here as if it did not include the cost of living and as if value of service were the sole standard. Plainly that position is untenable. If the State has power to single out

for regulation the amount of wages to be paid women, the value of their services would be a material consideration. But that fact has no relevancy upon the question whether the State has any such power. And utterly without significance upon the question of power is the suggestion that the New York prescribed standard includes value of service with cost of living whereas the District of Columbia standard was based upon the latter alone. As shown above, the dominant issue in the *Adkins* case was whether Congress had power to establish minimum wages for adult women workers in the District of Columbia. The opinion directly answers in the negative. The ruling that defects in the prescribed standard stamped that Act as arbitrary and invalid was an additional ground of subordinate importance.

The dissenting opinion of Mr. Chief Justice Taft (in which Mr. Justice Sanford concurred) assumes (p. 564) "that the conclusion in this (*Adkins*) case rests on the distinction between a minimum of wages and a maximum of hours." That is the only point he discussed; he did not refer to the validity of the standard prescribed by the Act. The dissenting opinion of Mr. Justice Holmes begins (p. 567): "The question in this case is the broad one, Whether Congress can establish minimum rates of wages for women in the District of Columbia with due provision for special circumstances, or whether we must say that Congress has no power to meddle with the matter at all." . . . If the decision of the court turned upon the question of the validity of the particular standard, that question could not have been ignored by the justices who were in favor of upholding the Act. Clearly they understood—and rightly—that, by the opinion of the court, it was held that Congress was without power to deal with the subject at all. . . .

MR. CHIEF JUSTICE HUGHES, dissenting.

I am unable to concur in the opinion in this case. In view of the difference between the statutes involved, I cannot agree that the case should be regarded as controlled by *Adkins v. Children's Hospital*, 261 U. S. 525. . . .

That the difference is a material one, I think is shown by the opinion in the *Adkins* case. That opinion contained a broad discussion of state power, but it singled out as an adequate ground for the finding of invalidity that the statute gave no regard to the situation of the employer and to the reasonable value of the service for which the wage was paid. Upon this point the Court said (261 U. S. pp. 558, 559):

"The feature of this statute which, perhaps more than any other, puts upon it the stamp of invalidity is that it exacts from the employer an arbitrary payment for a purpose and upon a basis having no causal

connection with his business, or the contract or the work the employee engages to do. . . . The ethical right of every worker, man or woman, to a living wage may be conceded . . . ; but the fallacy of the proposed method of attaining it is that it assumes that every employer is bound at all events to furnish it. . . . A statute requiring an employer to pay in money, to pay at prescribed and regular intervals, to pay the value of the services rendered, even to pay with fair relation to the extent of the benefit obtained from the service, would be understandable. . . .”

. . . . The Court was closely divided in the *Adkins* case, and that decision followed an equal division of the Court, after reargument, in *Stettler v. O'Hara*, 243 U. S. 629, with respect to the validity of the minimum wage law of Oregon. Such divisions are at times unavoidable, but they point to the desirability of fresh consideration when there are material differences in the cases presented. The fact that in the *Adkins* case there were dissenting opinions maintaining the validity of the federal statute, despite the nature of the standard it set up, brings out in stronger relief the ground which was taken most emphatically by the majority in that case, and that there would have been a majority for the decision in the absence of that ground must be a matter of conjecture. With that ground absent, the *Adkins* case ceases to be a precise authority.

We have here a question of constitutional law of grave importance, applying to the statutes of several States in a matter of profound public interest. I think that we should deal with that question upon its merits, without feeling that we are bound by a decision which on its facts is not strictly in point. . . .

The Legislature finds that the employment of women and minors in trade and industry in the State of New York at wages unreasonably low and not fairly commensurate with the value of the services rendered is a matter of vital public concern; that many women and minors are not as a class upon a level of equality in bargaining with their employers in regard to minimum fair wage standards, and that ‘freedom of contract’ as applied to their relations with employers is illusory; . . . and that judged by any reasonable standard, wages in many instances are fixed by chance and caprice and the wages accepted are often found to bear no relation to the fair value of the service. . . .

In the factual brief statistics are presented showing the increasing number of wage earning women. . . . Data are submitted, from reports of the Women’s Bureau of the United States Department of Labor, showing such discrepancies and variations in wages paid for identical work as to indicate that no relationship exists between the value of the services rendered and the wages paid. . . . The seriousness of the social

problem is presented. Inquiries by the New York State Department of Labor in coöperation with the Emergency Relief Bureau of New York City disclosed the large number of women employed in industry whose wages were insufficient for the support of themselves and those dependent upon them. For that reason they had been accepted for relief and their wages were being supplemented by payments from the Emergency Relief Bureau. Thus the failure of over-reaching employers to pay to women the wages commensurate with the value of services rendered has imposed a direct and heavy burden upon the taxpayers. The weight of this burden and the necessity for taking reasonable measures to reduce it, in the light of the enormous annual budgetary appropriation for the Department of Public Welfare of New York City, is strikingly exhibited in the brief filed by the Corporation Counsel of the City as an *amicus curiae*.

We are not at liberty to disregard these facts. . . .

We have had frequent occasion to consider the limitations of liberty of contract. While it is highly important to preserve that liberty from arbitrary and capricious interference, it is also necessary to prevent its abuse, as otherwise it could be used to override all public interests and thus in the end destroy the very freedom of opportunity which it is designed to safeguard.

We have repeatedly said that liberty of contract is a qualified and not an absolute right. . . . Thus we have upheld the limitation of hours of employment in mines and smelters . . . ; the requiring of redemption in cash of store orders or other evidences of indebtedness issued in payment of wages . . . ; the prohibition of contracts for options to sell or buy grain or other commodities at a future time . . . ; the forbidding of advance payments to seamen . . . ; the prohibition of contracts to pay miners employed at quantity rates upon the basis of screened coal instead of the weight of the coal as originally produced in the mine . . . ; . . . the limitation of hours of employment in manufacturing establishments with a specified allowance of overtime payment . . . the regulation of sales of stocks and bonds to prevent fraud . . . ; the regulation of the price of milk. . . .

If liberty of contract were viewed from the standpoint of absolute right, there would be as much to be said against a regulation of the hours of labor of women as against the fixing of a minimum wage. Restriction upon hours is a restriction upon the making of contracts and upon earning power. . . .

I am authorized to state that MR. JUSTICE BRANDEIS, MR. JUSTICE STONE, and MR. JUSTICE CARDOZO join in this opinion.

MR. JUSTICE STONE, dissenting.

While I agree with all that the CHIEF JUSTICE has said, I would not make the differences between the present statute and that involved in the *Adkins* case the sole basis of decision. I attach little importance to the fact that the earlier statute was aimed only at a starvation wage and that the present one does not prohibit such a wage unless it is also less than the reasonable value of the service. . . .

The vague and general pronouncement of the Fourteenth Amendment against deprivation of liberty without due process of law is a limitation of legislative power, not a formula for its exercise. It does not purport to say in what particular manner that power shall be exerted. It makes no fine-spun distinctions between methods which the legislature may and which it may not choose to solve a pressing problem of government. It is plain, too, that, unless the language of the amendment and the decisions of this Court are to be ignored, the liberty which the Amendment protects is not freedom from restraint of all law or of any law which reasonable men may think an appropriate means for dealing with any of those matters of public concern with which it is the business of government to deal. There is grim irony in speaking of the freedom of contract of those who, because of their economic necessities, give their services for less than is needful to keep body and soul together. . . .

If it is a subject upon which there is power to legislate at all, the Fourteenth Amendment makes no distinction between the methods by which legislatures may deal with it, any more than it proscribes the regulation of one term of a bargain more than another if it is properly the subject of regulation. No one has yet attempted to say upon what basis of history, principles of government, law or logic, it is within due process to regulate the hours and conditions of labor of women, see *Muller v. Oregon*, 208 U.S. 412 . . . , and of men, *Bunting v. Oregon*, 243 U.S. 426, and the time and manner of payment of the wage, *McLean v. Arkansas*, (211 U.S. 539,) but that regulation of the amount of the wage passes beyond the constitutional limitation. . . .

. . . . In upholding state minimum price regulation in the milk industry, in *Nebbia v. New York*, (291 U.S. 502,) the Court declared, p. 537:

"So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote the public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied. . . ."

That declaration and decision should control the present case. They are irreconcilable with the decision and most that was said in the *Adkins* case. They have left the Court free of its restriction as a precedent, and free to declare that the choice of the particular form of regulation by which grave economic maladjustments are to be remedied is for legislatures and not the courts.

In the years that have intervened since the *Adkins* case we have had opportunity to learn that a wage is not always the resultant of free bargaining between employers and employees; that it may be one forced upon employees by their economic necessities and upon employers by the most ruthless of their competitors. We have had opportunity to perceive more clearly that a wage insufficient to support the worker does not visit its consequences upon him alone; that it may affect profoundly the entire economic structure of society and, in any case, that it casts on every taxpayer, and on government itself, the burden of solving the problems of poverty, subsistence, health and morals of large numbers in the community. Because of their nature and extent these are public problems. A generation ago they were for the individual to solve; today they are the burden of the nation. I can perceive no more objection, on constitutional grounds, to their solution by requiring an industry to bear the subsistence cost of the labor which it employs, than to the imposition upon it of the cost of its industrial accidents. . . .

It is not for the courts to resolve doubts whether the remedy by wage regulation is as efficacious as many believe, or is better than some other, or is better even than the blind operation of uncontrolled economic forces. The legislature must be free to choose unless government is to be rendered impotent. The Fourteenth Amendment has no more embedded in the Constitution our preference for some particular set of economic beliefs than it has adopted, in the name of liberty, the system of theology which we may happen to approve.

I know of no rule or practice by which the arguments advanced in support of an application for certiorari restrict our choice between conflicting precedents in deciding a question of constitutional law which the petition, if granted, requires us to answer. Here the question which the petition specifically presents is whether the New York statute contravenes the Fourteenth Amendment. . . . Unless we are now to construe and apply the Fourteenth Amendment without regard to our decisions since the *Adkins* case, we could not rightly avoid its reconsideration even if it were not asked. We should . . . leave . . . the method of solution of the problems to which the statute is addressed where . . . the Constitution has left them, to the legislative branch of the government. . . .

MR. JUSTICE BRANDEIS and MR. JUSTICE CARDOZO join in this opinion.

*The Public Welfare*ADAMS *v.* TANNER.

Supreme Court of the United States. 1917.
244 U.S. 590.

Appeal from the District Court of the United States for the Eastern District of Washington.

The case is stated in the opinion.

MR. JUSTICE McREYNOLDS delivered the opinion of the court.

As members of co-partnerships and under municipal licenses, during the year 1914 and before, appellants were carrying on in the City of Spokane well established agencies for securing employment for patrons who paid fees therefor. ["The Employment Agency Law" was submitted as an initiative measure to the people of Washington at a general election and received a majority vote, becoming law effective December 3, 1914. It provided in sum that no employment agency should receive a fee from a person seeking its aid in securing employment.] November 25, 1914, in the United States District Court, [appellants] filed their original bill against W. V. Tanner, Attorney General of the State, and George H. Crandall, Prosecuting Attorney for Spokane County. . . .

We have held employment agencies are subject to police regulation and control. . . . But we think it plain that there is nothing inherently immoral or dangerous to public welfare in acting as paid representative of another to find a position in which he can earn an honest living. On the contrary, such service is useful, commendable, and in great demand. . . .

Because abuses may, and probably do, grow up in connection with this business, is adequate reason for hedging it about by proper regulations. But this is not enough to justify destruction of one's right to follow a distinctly useful calling in an upright way. Certainly there is no profession, possibly no business, which does not offer peculiar opportunities for reprehensible practices. . . . Skillfully directed agitation might also bring about apparent condemnation of any one of them by the public. Happily for all, the fundamental guaranties of the Constitution cannot be freely submerged if and whenever some ostensible justification is advanced and the police power invoked.

The general principles by which the validity of the challenged meas-

ure must be determined have been expressed many times in our former opinions. It will suffice to quote from a few.

[The court quotes passages from *Allgeyer v. Louisiana*, 165 U.S. 578, 589; *Booth v. Illinois*, 184 U.S. 425, 429; *McLean v. Arkansas*, 211 U.S. 539, 547, 548; *Murphy v. California*, 225 U.S. 623, 628.]

We are of opinion that Initiative Measure Number 8 is arbitrary and oppressive, and that it unduly restricts the liberty of appellants to engage in a useful business. It may not therefore be enforced against them. . . .

MR. JUSTICE MCKENNA dissents upon the ground that under the decisions of this court—some of them so late as to require no citation or review—the law in question is a valid exercise of the police power of the State, directed against a demonstrated evil.

MR. JUSTICE BRANDEIS, dissenting.

To declare the statute of a State, enacted in the exercise of the police power, invalid under the Fourteenth Amendment, is a matter of such seriousness that I state the reasons for my dissent from the opinion of the court.

The statute of the State of Washington merely prohibits the taking of fees from those seeking employment.

Plaintiffs assert that this statute, if enforced, would compel them to discontinue business and would thus, in violation of the Fourteenth Amendment, deprive them of their liberty and property without due process of law. The act leaves the plaintiffs free to collect fees from employers; and it appears that private employment offices thus restricted are still carrying on business. But even if it should prove, as plaintiffs allege, that their business could not live without collecting fees from employees, that fact would not necessarily render the act invalid. . . . And this court has made it clear that a statute enacted to promote health, safety, morals or the public welfare may be valid, *although* it will compel discontinuance of existing business in whole or in part. . . . But where, as here, no question of interstate commerce is involved, this court has sustained also statutes or municipal ordinances which compelled discontinuance of such businesses as (a) of manufacturing and selling oleomargarine, *Powell v. Pennsylvania*, 127 U.S. 678; (b) of selling cigarettes, *Austin v. Tennessee*, 179 U.S. 343; (c) of selling futures in grain or other commodities, *Booth v. Illinois*, 184 U.S. 425; (d) of selling stocks on margin, *Otis v. Parker*, 187 U.S. 606; (e) of keeping billiard halls, *Murphy v. California*, 225 U.S. 623; (f) of selling trading stamps, *Rast v. Van Deman & Lewis Co.*, 240 U.S. 342, 368.

These cases show that the scope of the police power is not limited to regulation as distinguished from prohibition. They show also that the power of the State exists equally, whether the end sought to be attained is the promotion of health, safety or morals or is the prevention of fraud or the prevention of general demoralization. . . . Or as it is so frequently expressed, the action of the legislature is final, unless the measure adopted appears clearly to be arbitrary or unreasonable or to have no real or substantial relation to the object sought to be attained. Whether a measure relating to the public welfare is arbitrary or unreasonable, whether it has no substantial relation to the end proposed is obviously not to be determined by assumptions or by *a priori* reasoning. The judgment should be based upon a consideration of relevant facts, actual or possible—*Ex facto jus oritur*. That ancient rule must prevail in order that we may have a system of living law.

It is necessary to enquire, therefore: What was the evil which the people of Washington sought to correct? Why was the particular remedy embodied in the statute adopted? And, incidentally, what has been the experience, if any, of other States or countries in this connection? . . .

1. *The Evils.*

The evils with which the people of Washington were confronted arose partly from the abuses incident to the system of private employment agencies and partly from its inadequacy.

(a) *The abuses*

(b) *The inadequacy*

2. *The Remedies.*

During the fifteen years preceding 1914 there had been extensive experimentation in the regulation of private employment agencies. . . .

3. *Conditions in the State of Washington.*

The peculiar needs of Washington emphasized the defects of the system of private employment offices.

(a) *The evils.*

The conditions generally prevailing are described in a report recently published by the United States Department of Labor, thus:

"In no part of the United States perhaps is there so large a field for employment offices as in the Pacific States. . . . Much of the business activity is based upon the casual, short-time job. This in itself means the frequent shifting of workers from place to place. . . .

The necessity laid upon so many workers of constantly seeking new jobs opens a peculiarly fertile field for their exploitation by unscrupulous

private employment agencies. There is much testimony to the fact and frequency of such exploitation. . . ."

The reports of the Washington State Bureau of Labor give this description:

"The investigations of the Bureau show that the worst labor conditions in the state are to be found on highway and railroad construction work, and these are largely because the men are sent long distances by the employment agencies, are housed and fed poorly at the camps, and are paid on an average of \$1.75 to \$2.25 a day, out of which they are compelled to pay \$5.50 to \$7.00 per week for board, generally a hospital fee of some kind, always a fee to the employment agency and their transportation to the point where the work is being done. . . .

"That the honest toiler was their victim there is no question: not alone of a stiff fee for the information given but a systematic method was adopted in order to keep the business going. Managers of agencies and managers of jobs, their superintendents, foremen or sub-foremen, were in this scheme for fleecing the workingman. Men in large numbers would be sent to contract jobs and if on the railroads 'free fare' was part of the inducement, or perhaps the agency would charge a nominal fee if the distance was great and this, too, would become a perquisite of the bureau to finally go through the clearing house. In many cases men would be unsatisfactory, at least they would be told so, discharged in a few days and sent adrift as poor, maybe poorer, than when they came there. New men would have to be secured, and thus the thing would go on revolving. . . ."

(b) *The remedies.* . . .

4. *The Fundamental Problem.*

The problem which confronted the people of Washington was far more comprehensive and fundamental than that of protecting workers applying to the private agencies. It was the chronic problem of unemployment. . . . There is reason to believe that the people of Washington not only considered the collection by the private employment offices of fees from employees a social injustice; but that they considered the elimination of the practice a necessary preliminary to the establishment of a constructive policy for dealing with the subject of unemployment. . . .

And weight should be given to the fact that the statute has been held constitutional by the Supreme Court of Washington and by the Federal District Court (three judges sitting)—courts presumably familiar with the local conditions and needs. . . .

In so far as the statute may be regarded as a step in the effort to overcome industrial maladjustment and unemployment by shifting to the

employer the payment of fees, if any, the action taken may be likened to that embodied in the Washington Workmen's Compensation Law (sustained in *Mountain Timber Co. v. Washington*, 243 U.S. 219) whereby the financial burden of industrial accidents is required to be borne by the employers. . . .

MR. JUSTICE HOLMES and MR. JUSTICE CLARKE concur in this dissent.⁶

BURNS BAKING CO. v. BRYAN.

Supreme Court of the United States. 1924.
264 U.S. 504.

MR. JUSTICE BUTLER delivered the opinion of the Court.

An act of the legislature of Nebraska provides that every loaf of bread offered for sale shall be one-half pound, one pound, a pound and a half, or exact multiples of one pound, and prohibits loaves of other weights. It allows a tolerance in excess of the specific standard weights at the rate of two ounces per pound and no more, and requires that the specified weight shall be the average weight of not less than 25 loaves. . . .

Four of the plaintiffs in error are engaged in Nebraska in the business of baking and selling bread for consumption there and in other States. The other plaintiff in error is a retail grocer at Omaha, and sells bread to consumers principally in single loaf lots. They brought this suit against the Governor and the Secretary of the Department of Agriculture of the State to restrain the enforcement of the act on the ground, among others, that it is repugnant to the due process clause of the Fourteenth Amendment. The State Supreme Court sustained the act. The case is here on writ of error. . . .

Undoubtedly, the police power of the State may be exerted to protect purchasers from imposition by sale of short weight loaves. . . . But a State may not, under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them. . . . Constitutional protection having been invoked, it is the duty of the court to determine whether the challenged provision has reasonable relation to the protection of purchasers of bread against fraud by short weights and really tends to accomplish the purpose for which it was enacted. . . .

The loaf is the usual form in which bread is sold. The act does not

⁶ The controlling majority was formed by PITNEY, McREYNOLDS, DAY and VAN DEVANTER, JJ., and WHITE, C.J.—Ed.

make it unlawful to sell individual loaves weighing more or less than the standard weights respectively. Loaves of any weight may be sold without violation of the act, if the average weight of not less than 25 does not exceed the permitted maximum or fall short of the specified nominal weights during 24 hours after baking. . . . Plaintiffs in error . . . insist that the difference permitted by the act between the weight of loaves when taken from the oven and their weight 24 hours later is too small, and that it is impossible for bakers to carry on their business without sometimes exceeding the maximum or falling short of the minimum average weights. Any loaves of the same unit at any time on hand during 24 hours after baking may be selected to make up the 25 or more to be weighed in order to test compliance with the act. Therefore, if only a small percentage of the daily output of the loaves in large bakeries shall exceed the maximum when taken from the oven or fall below the minimum weight within 24 hours, it will always be possible to make up lots of 25 or more loaves whose average weight will be above or below the prescribed limits.

The parties introduced much evidence on the question whether it is possible for bakers to comply with the law. A number of things contribute to produce unavoidable variations in the weights of loaves at the time of and after baking. The water content of wheat, of flour, of dough, and of bread immediately after baking varies substantially and is beyond the control of bakers. Gluten is an important element in flour, and flour rich in gluten requires the addition of more water in bread-making and makes better bread than does flour of low or inferior gluten content. Exact weights and measurements used in doughmaking cannot be attained. Losses in weight while dough is being mixed, during fermentation and while the bread is in the oven, vary and cannot be avoided or completely controlled. No hard and fast rule or formula is followed in breadmaking. There are many various elements. Bread made from good flour loses more weight than does bread made from inferior flours. Defendants' tests were made principally with loaves which were wrapped so as to retard evaporation; and it was shown that by such wrapping the prohibited variations in weight may be avoided. On the other hand, the evidence clearly establishes that there are periods when evaporation under ordinary conditions of temperature and humidity prevailing in Nebraska exceeds the prescribed tolerance and makes it impossible to comply with the law without wrapping the loaves or employing other artificial means to prevent or retard evaporation. And the evidence indicates that these periods are of such frequency and duration that the enforcement of the penalties prescribed for violations would be an intolerable burden upon bakers of bread for sale. . . . The reasonableness of the regulation complained of fairly may be measured by the variations

in weight of bread so made. . . . As indicated by the opinion of the State Supreme Court, ingredients selected to lessen evaporation after baking would make an inferior and unsalable bread. It would be unreasonable to compel the making of such a product or to prevent making of good bread in order to comply with the provisions of the act fixing maximum weights. . . . The uncontradicted evidence shows that there is a strong demand by consumers for unwrapped bread. It is a wholesome article of food and plaintiffs in error and other bakers have a right to furnish it to their customers. . . . It would be unreasonable to prevent unwrapped bread being furnished to those who want it in order technically to comply with a weight regulation and to keep within limits of tolerance so narrow as to require that ordinary evaporation be retarded by wrapping or other artificial means. . . .

No question is presented as to the power of the State to make regulations safeguarding or affecting the qualities of bread. . . . There is no evidence in support of the thought that purchasers have been or are likely to be induced to take a nine and a half or a ten ounce loaf for a pound (16 ounce) loaf, or an eighteen and a half or a 19 ounce loaf for a pound and a half (24 ounce) loaf; and it is contrary to common experience and unreasonable to assume that there could be any danger of such deception. Imposition through short weights readily could have been dealt with in a direct and effective way. For reasons stated, we conclude that the provision . . . subjects bakers and sellers of bread to restrictions which are essentially unreasonable and arbitrary, and is therefore repugnant to the Fourteenth Amendment.

MR. JUSTICE BRANDEIS, (with whom MR. JUSTICE HOLMES concurs) dissenting.

The purpose of the Nebraska standard-weight bread law is to protect buyers from short weights and honest bakers from unfair competition. . . .

To bake a loaf of any size other than the standard is made a misdemeanor. Why baking a loaf which weighs less than the standard should be made a crime is obvious. Such a loaf is a handy instrument of fraud. Why it should be a crime to bake one which weighs more than the standard is not obvious. The reason given is that such a loaf, also, is a handy instrument of fraud. . . . The buyer has usually in mind the difference in appearance between a one-pound loaf and a pound-and-a-half loaf, so that it is difficult for the dealer to palm off the former for the latter. But a loaf weighing one pound and five ounces may look so much like the buyer's memory of the pound-and-a-half-loaf that the dealer may effectuate the fraud by delivering the former. The prohibition

of excess weight is imposed in order to prevent a loaf of one standard size from being increased so much that it can readily be sold for a loaf of a larger standard size.

With the wisdom of the legislation we have, of course, no concern. But, under the due process clause as construed, we must determine whether the prohibition of excess weights can reasonably be deemed necessary; whether the prohibition can reasonably be deemed an appropriate means of preventing short weights and incidental unfair practices; and whether compliance with the limitation prescribed involves an enquiry into facts. Unless we know the facts on which the legislators may have acted, we cannot properly decide whether they were (or whether their measures are) unreasonable, arbitrary or capricious. Knowledge is essential to understanding; and understanding should precede judging. Sometimes, if we would guide by the light of reason, we must let our minds be bold. But, in this case, we have merely to acquaint ourselves with the art of breadmaking and the usages of the trade; with the devices by which buyers of bread are imposed upon and honest bakers or dealers are subjected by their dishonest fellows to unfair competition; with the problems which have confronted public officials charged with the enforcement of the laws prohibiting short weights, and with their experience in administering those laws.

First. Why did legislators, bent only on preventing short weights, prohibit, also, excessive weights? It was not from caprice or love of symmetry. It was because experience had taught consumers, honest dealers and public officials . . . that, if short weights were to be prevented, the prohibition of excessive weights was an administrative necessity. . . .

Second. Is the prohibition of excess weights calculated to effectuate the purpose of the act? . . . That it has proved elsewhere an important aid is shown by abundant evidence of the highest quality. . . .

Third. Does the prohibition of excess weight impose unreasonable burdens upon the business of making and selling bread? In other words, would compliance involve bakers in heavy costs; or necessitate the employment of persons of greater skill than are ordinarily available? Or, would the probability of unintentional transgression be so great as unreasonably to expose those engaged in the business to the danger of criminal prosecution? Facts established by widespread and varied experience of the bakers under laws containing a similar provision, and the extensive investigation and experiments of competent scientists, seem to compel a negative answer to each of these questions. But we need not go so far. There is certainly reason to believe that the provision does not subject the baker to an appreciable cost; that it does not require a higher degree of skill than is commonly available to bakery concerns; and that it does not expose honest bakers to the danger of criminal pro-

ceedings. As to these matters, also, the experience gained during the period of Food Administration control, and since then in the several States, is persuasive. For under the Food Administration, and in most of the States, the business was successfully conducted under provisions for tolerances which were far more stringent than that enacted in Nebraska. In the Food Administration regulation, and in most of the statutes, the tolerance was one ounce in the pound. In Nebraska it is two. In some States the weight is taken of the individual loaf. In Nebraska it is the average of at least twenty-five loaves. In some States in which the average is taken, it is computed on a less number of loaves than twenty-five. In some, where an average of twenty-five is taken the tolerance is smaller. Moreover, even if it were true that the varying evaporation made compliance with the law difficult, a sufficiently stable weight can, confessedly, be secured by the use of oil paper wrapping (now required in several States for sanitary reasons), which can be inexpensively supplied. Furthermore, as bakers are left free to charge for their bread such price as they choose, enhanced cost of conducting the business would not deprive them of their property without due process of law. Can it be said, in view of these facts, that the legislature of Nebraska had no reason to believe that the excess weight provision would not unduly burden the business of making and selling bread?

Much evidence referred to by me is not in the record. Nor could it have been included. It is the history of the experience gained under similar legislation, and the result of scientific experiments made, since the entry of the judgment below. Of such events in our history, whether occurring before or after the enactment of the statute or of the entry of the judgment, the Court should acquire knowledge, and must, in my opinion, take judicial notice, whenever required to perform the delicate judicial task here involved. . . . The evidence contained in the record in this case is, however, ample to sustain the validity of the statute. . . . Put at its highest, our function is to determine, in the light of all facts which may enrich our knowledge and enlarge our understanding, whether the measure, enacted in the exercise of an unquestioned police power, and of a character inherently unobjectionable, transcends the bounds of reason. That is, whether the provision as applied is so clearly arbitrary or capricious that legislators acting reasonably could not have believed it to be necessary or appropriate for the public welfare.

To decide that the prohibition of excess weights "is not necessary for the protection of the purchasers against imposition and fraud by short weights"; that it "is not calculated to effectuate that purpose"; and that it "subjects bakers and sellers of bread" to heavy burdens, is, in my opinion, an exercise of the powers of a super-legislature. . . .

VILLAGE OF EUCLID, OHIO *v.* AMBLER REALTY CO.

Supreme Court of the United States. 1926.
272 U.S. 365.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

Appellee is the owner of a tract of land containing 68 acres, situated in the westerly end of the village, abutting on Euclid avenue to the south and the Nickel Plate Railroad to the north. Adjoining this tract, both on the east and on the west, there have been laid out restricted residential plats upon which residences have been erected.

On November 13, 1922, an ordinance was adopted by the village council, establishing a comprehensive zoning plan for regulating and restricting the location of trades, industries, apartment houses, two-family houses, single family houses, etc., the lot area to be built upon, the size and height of buildings, etc. . . .

Before proceeding to a consideration of the case, it is necessary to determine the scope of the inquiry. The bill alleges that the tract of land in question is vacant and has been held for years for the purpose of selling and developing it for industrial uses, for which it is essentially adapted, being immediately in the path of progressive industrial development; that for such uses it has a market value of about \$10,000 per acre, but if the use be limited to residential purposes the market value is not in excess of \$2,500 per acre; that the first 200 feet of the parcel back from Euclid avenue, if unrestricted in respect of use, has a value of \$150 per front foot, but if limited to residential uses, and ordinary mercantile business be excluded therefrom, its value is not in excess of \$50 per front foot. . . .

The effect of the allegations of the bill is that the ordinance of its own force operates greatly to reduce the value of appellee's lands and destroy their marketability for industrial, commercial and residential uses, and the attack is directed . . . against the ordinance as an entirety. . . .

Building zone laws are of modern origin. They began in this country about 25 years ago. . . . Regulations, the wisdom, necessity, and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. . . . And in this there is no inconsistency, for, while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. . . .

The ordinance now under review, and all similar laws and regulations, must find their justification in some aspect of the police power, asserted for the public welfare. The line which in this field separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation. It varies with circumstances and conditions. A regulatory zoning ordinance, which would be clearly valid as applied to the great cities, might be clearly invalid as applied to rural communities. . . . Thus the question whether the power exists to forbid the erection of a building of a particular kind or for a particular use, like the question whether a particular thing is a nuisance, is to be determined, not by an abstract consideration of the building or of the thing considered apart, but by considering it in connection with the circumstances and the locality. . . . A nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard. If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control. . . .

There is no serious difference of opinion in respect of the validity of laws and regulations fixing the height of buildings within reasonable limits, the character of materials and methods of construction, and the adjoining area which must be left open, in order to minimize the danger of fire or collapse, the evils of overcrowding and the like, and excluding from residential sections offensive trades, industries and structures likely to create nuisances. . . .

Here, however, the exclusion is in general terms of all industrial establishments, and it may thereby happen that not only offensive or dangerous industries will be excluded, but those which are neither offensive nor dangerous will share the same fate. But this is no more than happens in respect of many practice-forbidding laws which this court has upheld, although drawn in general terms so as to include individual cases that may turn out to be innocuous in themselves. . . . The inclusion of a reasonable margin to insure effective enforcement, will not put upon a law, otherwise valid, the stamp of invalidity. Such laws may also find their justification in the fact that, in some fields, the bad fades into the good by such insensible degrees that the two are not capable of being readily distinguished and separated in terms of legislation. In the light of these considerations, we are not prepared to say that the end in view was not sufficient to justify the general rule of the ordinance, although some industries of an innocent character might fall within the proscribed class. . . .

We find no difficulty in sustaining restrictions of the kind thus far reviewed. The serious question in the case arises over the provisions of the ordinance excluding from residential districts apartment houses, business houses, retail stores and shops, and other like establishments. This

question involves the validity of what is really the crux of the more recent zoning legislation, namely, the creation and maintenance of residential districts, from which business and trade of every sort, including hotels and apartment houses, are excluded. Upon that question this court has not thus far spoken. The decisions of the state courts are numerous and conflicting; but those which broadly sustain the power greatly outnumber those which deny it altogether or narrowly limit it, and it is very apparent that there is a constantly increasing tendency in the direction of the broader view. . . .

The matter of zoning has received much attention at the hands of commissions and experts, and the results of their investigations have been set forth in comprehensive reports. These reports, which bear every evidence of painstaking consideration, concur in the view that the segregation of residential, business and industrial buildings will make it easier to provide fire apparatus suitable for the character and intensity of the development in each section; that it will increase the safety and security of home life, greatly tend to prevent street accidents, especially to children, by reducing the traffic and resulting confusion in residential sections, decrease noise and other conditions which produce or intensify nervous disorders, preserve a more favorable environment in which to rear children, etc. With particular reference to apartment houses, it is pointed out that the development of detached house sections is greatly retarded by the coming of apartment houses, which has sometimes resulted in destroying the entire section for private house purposes; that in such sections very often the apartment house is a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district. Moreover, the coming of one apartment house is followed by others, interfering by their height and bulk with the free circulation of air and monopolizing the rays of the sun which otherwise would fall upon the smaller homes, and bringing, as their accompaniments, the disturbing noises incident to increased traffic and business, and the occupation, by means of moving and parked automobiles, or larger portions of the streets, thus detracting from their safety and depriving children of the privilege of quiet and open spaces for play, enjoyed by those in more favored localities. . . . Under these circumstances, apartment houses, which in a different environment would be not only entirely unobjectionable but highly desirable, come very near to being nuisances.

If these reasons, thus summarized, do not demonstrate the wisdom or sound policy in all respects of those restrictions which we have indicated as pertinent to the inquiry, at least, the reasons are sufficiently cogent to preclude us from saying, as it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary

and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare. . . .

It is true that when, if ever, the provisions set forth in the ordinance in tedious and minute detail, come to be concretely applied to particular premises, . . . some of them, or even many of them, may be found to be clearly arbitrary and unreasonable. But where the equitable remedy of injunction is sought, as it is here, not upon the ground of a present infringement or denial of a specific right, or of a particular injury in process of actual execution, but upon the broad ground that the mere existence and threatened enforcement of the ordinance . . . constitute a present and irreparable injury, the court will not scrutinize its provisions, sentence by sentence, to ascertain by a process of piecemeal dissection whether there may be, here and there, provisions of a minor character, or relating to matters of administration . . . which, if attacked separately, might not withstand the test of constitutionality. . . .

And this is in accordance with the traditional policy of this court. In the realm of constitutional law, especially, this court has perceived the embarrassment which is likely to result from an attempt to formulate rules or decide questions beyond the necessities of the immediate issue. It has preferred to follow the method of a gradual approach to the general by a systematically guarded application and extension of constitutional principles to particular cases as they arise, rather than by out of hand attempts to establish general rules to which future cases must be fitted. This process applies with peculiar force to the solution of questions arising under the due process clause of the Constitution as applied to the exercise of the flexible powers of police, with which we are here concerned. . . .

MR. JUSTICE VAN DEVANTER, MR. JUSTICE McREYNOLDS, and MR. JUSTICE BUTLER dissent.

STEPHENSON *v.* BINFORD.

Supreme Court of the United States. 1932.
287 U.S. 251.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

The appellants severally were engaged in transporting freight by means of motortrucks over the highways of the state, between certain cities located within the state, under private contracts made with various named shippers, which contracts, among other terms, fixed the rate to be charged for the transportation services. While these contracts were

in force and in process of being performed, the state statute was passed, the effect of which, it is alleged, is to prohibit appellants from carrying out the terms of their contracts; to preclude them from transporting freight over the highways of the state under their contracts as private carriers to their great injury; and to subject them to criminal prosecutions. . . .

The following constitute the salient provisions of the act. . . . Section 3 provides that no common carrier of property for compensation or hire shall operate over the highways of the state without first obtaining a certificate of public convenience and necessity, and that no contract carrier shall thus operate without a permit so to do. Section 4 vests the Railroad Commission with authority to fix maximum or minimum rates in accordance with the specific provisions of the act. . . . The Railroad Commission and the highway commission are directed to cooperate in respect of the condition of the public highways and their ability to carry existing and proposed additional traffic. . . . Section 6aa gives the Commission authority to prescribe minimum rates to be collected by contract carriers "which shall not be less than the rates prescribed for common carriers for substantially the same service."

Section 6bb provides that no permit to operate as a contract carrier shall be granted to any person operating as a common carrier holding a certificate of convenience and necessity, and that no certificate of convenience and necessity shall be granted to any person operating as a contract carrier, and that no vehicle shall be operated by any motor carrier with both a permit and a certificate.

Section 13 requires all motor carriers to give bonds and insurance policies. . . .

Section 22(b) is a broad declaration of policy. It declares that the business of operating as a motor carrier of property for hire along the highways of the state is one affected with the public interest. It further declares that the rapid increase of motor carrier traffic and the lack of effective regulation have increased the dangers and hazards on public highways and made more stringent regulations imperative. . . .

Appellants assail the statute upon the following grounds: (1) That as applied to appellants, all of whom are private contract carriers, the result of the statute is to convert the private carriers into common carriers by legislative fiat. (2) That the business of appellants is not affected with a public interest, and the provisions of the statute constitute an attempt to deprive appellants of their property without due process of law. . . . (3) That the statute subjects them to other regulations before they can lawfully operate upon the highways, which regulations are not imposed upon other private carriers similarly

situated, and thereby appellants are denied the equal protection of the laws. (4) That other regulations to which appellants are subjected are not made applicable to persons using the highways in transportation of their own commodities under substantially similar conditions, and thereby appellants are denied the equal protection of the laws.

To these contentions appellees reply: (a) That the act does not undertake to convert the contract carriers into common carriers, or to require them to devote their property to any different or greater public use than that to which they have already voluntarily dedicated it, or to render any service beyond that which they have contracted to render, but merely fixes reasonable conditions upon the permissive use which they make of public property as a place of business. (b) That the act is bottomed upon the state's power to protect its highways and remove traffic hazards, as well as upon its power and duty to foster and preserve a dependable transportation system for the whole people. (c) That the contract carriers . . . are, under conditions now obtaining upon the highways, engaged in a business affected with a public interest, and the reasonable regulation of their rates and practices is essential for the protection of that interest. (d) That the act is not discriminatory in the particulars asserted by appellants.

First. It is well established law that the highways of the state are public property; that their primary and preferred use is for private purposes; and that their use for purposes of gain is special and extraordinary, which, generally, at least, the legislature may prohibit or condition as it sees fit. . . .

Putting aside the question whether the statute may stand against the attack made under the due process of law clause, upon the theory that appellants, by reason of their use of the public highways, are engaged in a business impressed with a public interest, and the question whether it may be justified on the ground that . . . it is necessary in order to prevent impairment of the public service of authorized common carriers adequately serving the same territory, we confine our inquiry to the question whether, in the light of the broad general rule just stated, the statute may be construed and sustained as a constitutional exercise of the legislative power to regulate the use of the state highways. . . .

We are of opinion that neither by specific provision . . . nor by the statute considered as a whole, is there an attempt to convert private contract carriers by motor into common carriers. Certainly, the statute does not say so. . . . It is true that the regulations imposed upon the two classes are in some instances similar, if not identical; but they are imposed upon each class considered by itself, and it does not follow that regulations appropriately imposed upon the business of a common carrier may not also be appropriate to the business of a contract carrier. . . .

We come, then, to consider the challenged provisions of the statute under review, in the light of their exclusive relation to contract carriers, unembarrassed by any previous ruling of this court. In view of the conclusions to which we shall come, it is not necessary to determine whether the operation of trucks for the transportation of freight under private contracts, carried into effect by the use of the public highways, is a business impressed with a public interest.

There is ample support in the record for the following findings of the court below:

"The evidence shows there are 1,360,413 motor vehicles other than either common or contract carriers or commercial carriers of passengers registered for use on the highways of Texas, and that it is one of the purposes of the Legislature to make the use of the highways safer and more convenient for these private operators, involving incidentally either a lessening of commercial transportation on the highways, or such improvement in their character and practices as to effect the same result. . . .

"The inevitable result of the continuance of the enormous increase of so-called private carriers for hire and the continual decrease in the number of common carriers holding certificates of public convenience and necessity will be the practical disappearance altogether of common carriers from the roads. . . .

"The experience of the Railroad Commission supports the Legislative declaration that unregulated contract carriers under the former law effectively prevent the primary purpose of fostering and conserving for the public welfare all commercial transportation on the highways which it has been the purpose of the laws of Texas, under rules of the Commission, to foster."

These and other findings and the evidence contained in the record conclusively show that during recent years the unregulated use of the highways of the state by a vast and constantly growing number of private contract carriers has had the effect of greatly decreasing the freight which would be carried by railroads within the state, and, in consequence, adding to the burden upon the highways. . . .

The assailed provisions, in this view, are not ends in and of themselves, but means to the legitimate end of conserving the highways. The extent to which, as means, they conduce to that end, the degree of their efficiency, the closeness of their relation to the end sought to be attained, are matters addressed to the judgment of the Legislature, and not to that of the courts. It is enough if it can be seen that in any degree, or under any reasonably conceivable circumstances, there is an actual relation between the means and the end. . . .

Turning our attention then to the provision for permits, it is to be

observed that the requirement is not that the private carrier shall obtain a certificate of public convenience and necessity, but that he shall obtain a permit, the issue of which is made dependent upon the condition that the efficiency of common carrier service then adequately serving the same territory shall not be impaired. Does the required relation here exist between the condition imposed and the end sought? We think it does. But, in any event, if the Legislature so concluded, as it evidently did, that conclusion must stand, since we are not able to say that in reaching it that body was manifestly wrong. . . .

What has just been said applies in the main to the other challenged provision authorizing the commission to prescribe minimum rates not less than those prescribed for common carriers for substantially the same service. This provision, by precluding the contract carriers from rendering service at rates under those charged by the railroad carriers, has a definite tendency to relieve the highways by diverting traffic from them to the railroads. . . . Undoubtedly, this interferes with the freedom of the parties to contract, but it is not such an interference as the Fourteenth Amendment forbids. While freedom of contract is the general rule, it is nevertheless not absolute but subject to a great variety of legitimate restraints, among which are such as are required for the safety and welfare of the state and its inhabitants. . . . When the exercise of that freedom conflicts with the power and duty of the state to safeguard its property from injury and preserve it for those uses for which it was primarily designed, such freedom may be regulated and limited to the extent which reasonably may be necessary to carry the power and duty into effect. . . .

Here the circumstance which justifies what otherwise might be an unconstitutional interference with the freedom of private contract is that the contract calls for a service, the performance of which contemplates the use of facilities belonging to the state; and it would be strange doctrine which, while recognizing the power of the state to regulate the use itself, would deny its power to regulate the contract so far as it contemplates the use. . . . *Sproles v. Binford*, 286 U.S. 374, at pages 390, 391. . . .

We need not consider whether the act in some other aspect would be good or bad. It is enough to support its validity that, plainly, one of its aims is to conserve the highways. If the Legislature had other or additional purposes, which, considered apart, it had no constitutional power to make effective, that would not have the result of making the act invalid. *Ellis v. United States*, 206 U.S. 246. Nor does it matter that the legislation has the result of modifying or abrogating contracts already in effect. Such contracts are to be regarded as having been made subject to the future exercise of the constitutional power of the state. *Louisville*

& *Nashville R. Co. v. Mottley*, 219 U.S. 467, 480, *et seq.* . . . *Sproles v. Binford*, *supra*, at pages 390, 391. . . .

The provision of section 13, requiring every motor carrier, whether operating under permit or certificate, to furnish a bond and policy of insurance is construed by appellants as including cargoes carried by them, and is assailed as a requirement bearing no relation to public safety, but as an attempt to condition the purely private contractual relationship between shipper and private carrier. . . . So far as appears, no attempt yet has been made to enforce the provision against any of these appellants, and until that is done they have no occasion to complain. Moreover, no state court thus far has dealt with the question, and, unless obliged to do otherwise, we should not adopt a construction which might render the provision of doubtful validity, but await a determination of the matter by the courts of the state.

Second. The contention that the act, in certain particulars, denies appellants the equal protection of the laws requires only brief consideration. Section 6(d) is said to discriminate arbitrarily against carriers of commodities of a similar character, in that the selected carriers are not required to comply with many of the onerous provisions of the statute. It is by no means clear that such is the case, and it is asserted on behalf of appellees, and not disputed, that the Attorney General of the state, in an official opinion, has construed the provision to mean that persons operating under these special permits either as contract or common carriers are subject to the provisions of the act applicable to such carriers, and that this construction has been accepted by the Railroad Commission. There is nothing in the record to suggest that the provision has been otherwise applied. Appellants in this regard, therefore, have no ground upon which to base a complaint.

Nor do we find merit in the further contention that the act arbitrarily discriminates against appellants because it does not apply to persons, commonly known as "shipper-owners," who are transporting their own commodities under substantially similar conditions. We are of opinion that all provisions relating to contract carriers which are germane to shipper-owners are made applicable to them. In any event, it is not shown that the act thus far has been so administered as to result in any unlawful discrimination. . . .

MR. JUSTICE BUTLER dissents.

The Police Power and Interstate Commerce

MC DERMOTT v. WISCONSIN

Supreme Court of the United States. 1913.
228 U.S. 115.

[The issue in this case arose over a conflict between federal and state laws prescribing the contents of labels on certain types of food. A Wisconsin statute required all corn syrup sold within the state to be labeled "Glucose flavored with" etc., if it contained over 75% of glucose. The federal law permitted this commodity, when shipped in interstate commerce, to be labeled "corn syrup." The Wisconsin law furthermore forbade any other label indicating a saccharine substance. McDermott, a retail merchant, received from Chicago twelve half-gallon cans of this "corn syrup," labeled only according to federal law. He took the cans from the package and placed them on the shelves of his store for sale. He was convicted of violating the state law and the conviction was affirmed by the state Supreme Court.]

MR. JUSTICE DAY delivered the opinion of the court.

It is insisted that the federal Food and Drugs Act, passed under the authority of the Constitution, has taken possession of this field of regulation, and that the state act is a wrongful interference with the exclusive power of Congress over interstate commerce. . . .

Congress . . . has the right not only to pass laws which shall regulate legitimate commerce among the states and with foreign nations, but has full power to keep the channels of such commerce free from the transportation of illicit or harmful articles, to make such as are injurious to the public health outlaws of such commerce, and to bar them from the facilities and privileges thereof. . . .

Section 2 of the Act provides that "the introduction into any state . . . from any other state . . . of any article of food or drugs which is adulterated or misbranded . . . is hereby prohibited." . . .

That the word "package," or its equivalent expression, as used by Congress in sections 7 and 8 in defining what shall constitute adulteration and what shall constitute misbranding within the meaning of the Act, clearly refers to the immediate container of the article which is intended for consumption by the public, there can be no question. . . . Within the limitations of its right to regulate interstate commerce, Congress manifestly is aiming at the contents of the package as it shall reach

the consumer, for whose protection the Act was primarily passed, and it is the branding upon the package which contains the article intended for consumption itself which is the subject-matter of regulation. Limiting the requirements of the Act as to adulteration and misbranding simply to the outside wrappings or box containing the packages intended to be purchased by the consumer, so that the importer, by removing and destroying such covering, could prevent the operation of the law on the imported article yet unsold, would render the Act nugatory and its provisions wholly inadequate to accomplish the purposes for which it was passed. . . .

When delivered for shipment and when received through the channels of interstate commerce, the cans in question bore brands or labels which were supposed to comply with the requirements of the Act of Congress. . . . The label upon the unsold article is, in the one case, the evidence of the shipper that he has complied with the Act of Congress, while in the other, by its misleading and false character, it furnishes the proof upon which the federal authorities depend to reach and punish the shipper and to condemn the goods. . . .

While in this situation, the goods being unsold, as a condition of their legitimate sale within the state, and also of their being in the possession of the importer for the purpose of sale, . . . the Wisconsin statute provides that they shall bear the label required by the state law and none other (which represents a saccharine substance, as do the labels in these cases). In other words, it is essential to a legal exercise of possession of and traffic in such goods under the state law that labels which presumably meet with the requirements of the federal law . . . shall be removed from the packages before the first sale by the importer. . . . Conceding to the state the authority to make regulations consistent with the federal law for the further protection of its citizens against impure and misbranded food and drugs, we think to permit such regulation as is embodied in this statute is to permit a state to discredit and burden legitimate federal regulations of interstate commerce, to destroy rights arising out of the federal statute which have accrued both to the government and the shipper, and to impair the effect of a federal law which has been enacted under the Constitutional power of Congress over the subject. . . .

It is insisted, however, that, since at the time when the state act undertook to regulate the branding of these goods, namely, when in the possession of the plaintiffs in error, and held upon their shelves for sale, the cans had been removed from the boxes in which they were shipped in interstate commerce, they had therefore passed beyond the jurisdiction of Congress, and their regulation was exclusively a matter for state legislation. This assertion is based upon the original-package doctrine as

it is said to have been laid down in the former decisions in this court. . . .
[*Brown v. Maryland*, 12 Wheat. 419, 441]

That doctrine has been many times applied in the decisions of this court in defining the line of demarcation which shall separate the federal from the state authority where the sovereign power of the nation or state is involved in dealing with property. And where it has been found necessary to decide the boundary of federal authority, it has been generally held that, where goods prepared and packed for shipment in interstate commerce are transported in such commerce, and delivered to the consignee, and the package by him separated into its component parts, the power of federal regulation has ceased and that of the state may be asserted. . . . In the view, however, which we take of this case, it is unnecessary to enter upon any extended consideration of the nature and scope of the principles involved in determining what is an original package. For, . . . keeping within its constitutional limitations of authority, Congress may determine for itself the character of the means necessary to make its purpose effectual . . . and when section 2 has been violated, the federal authority, in enforcing either section 2 or section 10, may follow the adulterated or misbranded article at least to the shelf of the importer. . . .

The doctrine of original package had its origin in the opinion of Chief Justice Marshall in *Brown v. Maryland*. . . . It was intended to protect the importer in the right to sell the imported goods which was the real object and purpose of importation. To determine the time when an article passes out of the interstate into state jurisdiction for the purpose of taxation is entirely different from deciding when an article which has violated a federal prohibition becomes immune. The doctrine was not intended to limit the right of Congress, now asserted, to keep the channels of interstate commerce free from the carriage of injurious or fraudulently branded articles, and to choose appropriate means to that end. . . .

LEMKE v. FARMERS GRAIN CO.

Supreme Court of the United States. 1922.
258 U.S. 50.

MR. JUSTICE DAY delivered the opinion of the court. . . .

We pass to a consideration of the merits. The record discloses that North Dakota is a great grain-growing State, producing annually large

crops, particularly wheat, for transportation beyond its borders. Complainant, and other buyers of like character, are owners of elevators and purchasers of grain bought in North Dakota to be shipped to and sold at terminal markets in other States, the principle markets being at Minneapolis and Duluth. There is practically no market in North Dakota for the grain purchased by complainant. The Minneapolis prices are received at the elevator of the complainant from Minneapolis four times daily, and are posted for the information of those interested. To these figures the buyer adds the freight and his "spread," or margin, of profit. The purchases are generally made with the intention of shipping the grain to Minneapolis. . . . The producers know the basis upon which the grain is bought, but whoever pays the highest price gets the grain, Minneapolis, Duluth or elsewhere. . . . After the grain is loaded upon the cars it is generally consigned to a commission merchant at Minneapolis. At the terminal market the grain is inspected and graded by inspectors licensed under federal law.

That such a course of dealing constitutes interstate commerce, there can be no question . . . *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282. . . .

In view of this state of facts we come to inquire whether the North Dakota statute is a regulation of interstate commerce, and, therefore, beyond the legislative power of the State. . . .

This act shows a comprehensive scheme to regulate the buying of grain. Such purchases can only be made by those who hold licenses from the State, pay state charges for the same, and act under a system of grading, inspecting and weighing fully defined in the act. Furthermore, the grain can only be purchased subject to the power of the state grain inspector to determine the margin of profit which the buyer shall realize upon his purchase. . . . That is, the state officer may fix and determine the price to be paid for grain which is bought, shipped, and sold in interstate commerce. That this is a regulation of interstate commerce, is obvious from its mere statement. . . .

It is contended that these regulations may stand upon the principles recognized in decisions of this court which permit the State to make local laws under its police power in the interest of the welfare of its people, which are valid although affecting interstate commerce, and may stand, at least until Congress takes possession of the field under its superior authority to regulate commerce among the States. This principle has no application where the State passes beyond the exercise of its legitimate authority and undertakes to regulate interstate commerce by imposing burdens upon it. . . .

It is insisted that the price fixing feature of the statute may be ignored, and its other regulatory features of inspection and grading sus-

tained if not contrary to valid federal regulations of the same subject. But the features of this act, clearly regulatory of interstate commerce, are essential and vital parts of the general plan of the statute to control the purchase of grain and to determine the profit at which it may be sold. It is apparent that without these sections the state legislature would not have passed the act. Without their enforcement the plan and scope of the act fails of accomplishing its manifest purpose. We have no authority to eliminate an essential feature of the law for the purpose of saving the constitutionality of parts of it. . . .

It is alleged that such legislation is in the interest of the grain growers and essential to protect them from fraudulent purchases, and to secure payment to them of fair prices for the grain actually sold. This may be true, but Congress is amply authorized to pass measures to protect interstate commerce if legislation of that character is needed. The supposed inconveniences and wrongs are not to be redressed by sustaining the constitutionality of laws which clearly encroach upon the field of interstate commerce placed by the Constitution under federal control. . . .

MR. JUSTICE BRANDEIS dissenting, with whom MR. JUSTICE HOLMES and MR. JUSTICE CLARKE concur. . . .

In 1919 the Legislature of North Dakota concluded that its farmers were being systematically defrauded in purchases of their grain made within the State. The buyers were largely local mills, of which there are 160, and local elevators, of which there are 2,200. The fraud was perpetrated, in part, by underweighing and undergrading in the unofficial inspection of the grain made locally or on behalf of the purchasers. In part, the fraud was perpetrated by means of unconscionable bargains made locally, through which valuable dockage was obtained from the farmer without any payment therefor or by which the grain itself was bought at less than its fair value. Against such frauds the federal act [United States Grain Standards Act, August 11, 1916, c. 313, Part B; 39 Stat. 482, did not purport to afford any protection. So far as the transactions were wholly intrastate, Congress was without power to do so. So far as the sales were part of transactions in interstate commerce, the power was ample; but Congress did not see fit to exert it. And the Secretary of Agriculture did not even exercise his authority to provide for federal inspection and grading within North Dakota of such grain as was shipped from there in interstate commerce. That was left by him to be done after the grain reached Minnesota or other States.

To protect the North Dakota farmer against these frauds practiced by local buyers its Legislature enacted c. 138 of the Laws of 1919. The statute seeks to effect protection (a) by establishing a system of state

inspection, grading and weighing; (b) by prohibiting anyone from purchasing grain before it is inspected, graded and weighed (except that one producer may buy from another); (c) by ascertaining in the course of inspection, grading and weighing, the amount of dockage, and requiring a purchaser of the grain either to pay separately for the dockage or to return the same to the farmer; (d) by requiring payment to the farmer of the fair value of grain—the value to be ascertained by fixing the so-called margin; (e) by ensuring compliance with the above provisions through the further provision that only persons or concerns licensed to inspect, grade and weigh may buy grain before it has been officially inspected. The standards of quality and condition established by the Secretary of Agriculture were adopted under regulations issued by the State Inspector of Grades, Weights and Measures; and all state inspectors (including licensed buyers) were required to observe those grades.

Ordinarily when a State's police power is exerted in connection with sales it is the buyer whom the law seeks to protect; and the seller is licensed as part of the machinery to enforce the regulations prescribed. I cannot doubt that the State has power as broad to protect the seller and, to that end, to license the buyer. . . . Ordinarily the function of inspection, grading and measurement is committed to a public official or other impartial person. But I am not aware of any constitutional objection to imposing the duty upon the buyer, where conditions demand it. The requirement that the amount of the dockage shall be ascertained and that it shall be paid separately or be returned, does not differ in principle from the requirement upheld in *McLean v. Arkansas*, 211 U.S. 539, that coal shall be measured before screening, or the requirement upheld in *Knoxville Iron Co. v. Harbison*, 183 U.S. 13, that store orders shall be redeemed in cash, or that upheld in *House v. Mayes*, . . . [219 U.S. 270] which prohibited, in the purchase of grain, making arbitrary deductions from the actual weight. The requirement that the buyer shall take only a proper margin for graded grain is, in effect, requiring that he pay a fair price. . . . Nor can there be any constitutional objection to using, as a factor determining what is fair, the price prevailing in terminal markets—even if they happen to be located in another State.

Whether the purchases involved in this case were intrastate or interstate commerce we need not decide. For the fact that a sale or purchase is part of a transaction in interstate commerce does not preclude application of state inspection laws, unless Congress has occupied the field or the state regulation directly burdens interstate commerce. . . . The requirement of a license and the payment of a \$10 license fee, if applied to non-residents not regularly engaged in buying grain within the State, might perhaps be obnoxious to the Commerce Clause. But the objection, if sound, would not afford this plaintiff ground for attacking

the validity of the statute. . . . It is a North Dakota corporation, owner of an elevator within the State, and carrying on business there under the laws of the State as a public warehouseman. . . . It is possible also that some provision in the license or some regulation issued by the State Inspector is obnoxious to the Commerce Clause. If so a licensee may disregard it. . . . Even if the margin clause should be held a burden upon interstate commerce, still that would not invalidate the whole statute. The margin clause is separable from the other provisions of the act; and it could be eliminated without affecting the operation of any other feature of the state system. . . . And it is clear that the Legislature would have wished to secure the protection afforded by the other provisions, if this one should be held to be beyond the power of the State. . . .

To strike down this inspection law, instead of limiting the sphere of its operation, seems to me a serious curtailment of the functions of the State and leaves the farmers of North Dakota defenceless against what are asserted to be persistent, palpable frauds.

WHITFIELD *v.* OHIO.

Supreme Court of the United States. 1936.

297 U.S. 431.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

Petitioner was charged in the Municipal Court of Cleveland with a violation of # 2228-1 of the Ohio General Code, adopted March 23, 1933, which provides:

"After January 19, 1934, no goods, wares or merchandise, manufactured or mined wholly or in part in any other state by convicts or prisoners, except convicts or prisoners on parole or probation, shall be sold on the open market in this state."

. . . . An Act of Congress passed January 19, 1929 (effective five years later), c. 79, §§ 1-2, 45 Stat. 1084, Title 49, U. S. C., § 60, commonly called the Hawes-Cooper Act, provides:

" . . . All goods, wares, and merchandise manufactured, produced, or mined, wholly or in part, by convicts or prisoners, except convicts or prisoners on parole or probation, or in any penal and/or reformatory institutions, except commodities manufactured in Federal penal and correctional institutions for use by the Federal Government transported into any State or Territory of the United States and remaining therein for use, consumption, sale, or storage, shall upon arrival and delivery in such State or Territory be subject to the operation and effect of the

laws of such State or Territory to the same extent and in the same manner as though such goods, wares, and merchandise had been manufactured, produced, or mined in such State or Territory, and shall not be exempt therefrom by reason of being introduced in the original package or otherwise."

[The following statement is substituted for the findings of facts in the opinion: Whitfield sold in the open market in Cleveland, Ohio, a dozen men's work shirts which had been made by prisoners in the Wetumpka Prison in the State of Alabama. The prisoners were neither on parole nor probation; the shirts were sold in the original packages. Whitfield also sold six dozen of the same shirts, made by the same prisoners under the same conditions, to R. C. Kissack of Lakewood, Ohio. These shirts, however, were not delivered at the time of sale, but were to be shipped from the prison to Kissack's residence.]

The case was tried without a jury. The court found petitioner guilty upon both counts, and sentenced him to pay a fine of \$25 and costs.

An appeal was taken to the Court of Appeals of Ohio . . . where the judgment was affirmed. . . . A petition in error to the Supreme Court of Ohio was dismissed by that court on the ground that no debatable constitutional question was involved. . . . This court granted certiorari.

Petitioner assails the constitutional validity of the Ohio statute and also of the Hawes-Cooper Act. . . .

1. . . . The effect of the privileges and immunities clause of the Fourteenth Amendment, as applied to the facts of the present case, is to deny the power of Ohio to impose restraints upon citizens of the United States resident in Alabama in respect of the disposition of goods within Ohio, if like restraints are not imposed upon citizens resident in Ohio. . . . The statutory provision here challenged enforces, without discrimination, the same rule as to the convict-made goods of other states when they are brought into Ohio; and the contention in respect of the privileges and immunities clause must be rejected as without substance.

2. A serious question as to the infringement of the commerce clause of the Constitution is presented by the second count of the information. . . .

The first count simply charges, in the terms of the statute, that petitioner unlawfully sold on the open market in Ohio certain goods made by prison labor in Alabama. . . . When the goods were sold, their transportation had come to an end; and the regulative power of the state had attached, except so far as that power might be affected by the fact that the packages were still unbroken. But any restrictive influence which that fact otherwise might have had upon the state power was completely removed by Congress, if the Hawes-Cooper Act be valid. That act is in substance the same as the Wilson Act with respect to intoxicat-

ing liquors, passed August 8, 1890, as construed and upheld by this court. . . . Each statute simply permits the jurisdiction of the state to attach immediately upon delivery, whether the importation remain in the original package or not. In other words, the importation is relieved from the operation of any rule which recognizes a right of sale in the unbroken package without state interference—a right the exercise of which has never been regarded as a fundamental part of the interstate transaction, but only as an incident resulting therefrom. . . . The interstate transaction in its fundamental aspect ends upon delivery to the consignee.

The view of the State of Ohio that the sale of convict-made goods in competition with the products of free labor is an evil, finds ample support in fact and in the similar legislation of a preponderant number of the other states. Acts of Congress relating to the subject also recognize the evil. In addition to the Hawes-Cooper Act, the importation of the products of convict labor has been denied the right of entry at the ports of the United States and the importation prohibited. . . . And the sale to the public in competition with private enterprise of goods made by convicts imprisoned under federal law is forbidden. . . .

All such legislation, state and federal, proceeds upon the view that free labor, properly compensated, cannot compete successfully with the enforced and unpaid or underpaid convict labor of the prison. A state basing its legislation upon that conception has the right and power, so far as the federal Constitution is concerned, by non-discriminating legislation, to preserve its policy from impairment or defeat, by any means appropriate to the end and not inconsistent with that instrument.

If the power of Congress to remove the impediment to state control presented by the unbroken-package doctrine be limited in any way (a question which we do not now find it necessary to consider), it is clear that the removal of that impediment in the case of prison-made goods must be upheld for reasons akin to those which moved this court to sustain the validity of the Wilson Act. Even without such action by Congress the unbroken-package doctrine, as applied to interstate commerce, has come to be regarded, generally at least, as more artificial than sound. Indeed, in its relation to that commerce, it was definitely rejected in *Sonneborn Bros. v. Cureton*, 262 U.S. 506, 508-509, as affording no immunity from state taxation. "The interstate transportation," this court there concluded, "was at an end, and whether in the original package or not, a state tax upon the oil as property or upon its sale in the State, if the state law levied the same tax on all oil or all sales of it, without regard to origin, would be neither a regulation nor a burden of the interstate commerce of which this oil had been the subject."

Whether that view of the doctrine as applied to state taxation should

now be given a more general application, the Hawes-Cooper Act, being determinative of the case now under review, makes it unnecessary for us to decide.

3. That the Hawes-Cooper Act does not constitute a delegation of Congressional power to the states is made clear by *In re Rahrer*, [140 U.S. 545], pp. 560-561, and by what we have already said under subdivision 2.

MR. JUSTICE VAN DEVANTER, MR. JUSTICE McREYNOLDS, and MR. JUSTICE STONE concur in the result.

KELLY v. WASHINGTON.

Supreme Court of the United States. 1937.
302 U.S. 1.

MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court.

Respondents, owners of motor-driven tugs, sought a writ of prohibition to prevent the enforcement of provisions of c. 200 of the Washington Laws of 1907 . . . relating to the inspection and regulation of vessels. The Supreme Court of the State directed judgment for respondents, holding the statute invalid "if applied to the navigable waters over which the Federal Government has control." . . . We granted certiorari. . . . After hearing, we ordered reargument and requested the Attorney General of the United States to present the views of the Government upon the question whether the state Act or the action of the officers of the State thereunder conflicts with the authority of the United States or with the action of its officers under the Acts of Congress. The case has been reargued accordingly. . . .

The material facts, as set forth in the opinion of the state court, are that respondents own and operate one hundred and thirty-nine motor-driven tugs of which one hundred and eleven are less than sixty-five feet in length. Some of these tugs are registered and the remainder are enrolled and licensed under federal laws. For the most part these tugs are employed in intrastate commerce. . . . Practically all these tugs are capable of engaging in interstate or foreign commerce and will do so if and when opportunity offers. Some of the larger tugs have towed and will tow to California ports. The main business, however, of most of the tugs is confined to moving vessels engaged in interstate and foreign commerce and other work in and about the harbors where they are stationed. . . .

First. The first question is whether the state legislation as applied to

respondents' motor-driven tugs is in all respects in conflict with express provisions of the federal laws and regulations. Wherever such conflict exists, the state legislation must fall. . . .

We find the conclusion inescapable that, apart from the particular requirements in other respects, there is no provision of the federal laws and regulations for the inspection of the hull and machinery of respondents' motor-driven tugs. . . . It follows that inspection of the hull and machinery of these tugs by state authorities in order to insure safety and determine seaworthiness is not in conflict with any express provision of the federal laws and regulations. . . .

Second. The next question is whether the federal statutes are to be construed as implying prohibition of inspection by state authorities. . . .

The state court took the view that Congress had occupied the field and that no room was left for state action. . . . And this is the argument pressed by respondents and the Solicitor General.

This argument, invoking a familiar principle, would be unnecessary and inapposite if there were a direct conflict with an express regulation of Congress. . . . The argument presupposes the absence of a conflict of that character. The argument is also unnecessary and inapposite if the subject is one demanding uniformity of regulation so that state action is altogether inadmissible in the absence of federal action. In that class of cases the Constitution itself occupies the field even if there is no federal legislation. The argument is appropriately addressed to those cases where States may act in the absence of federal action but where there has been federal action governing the same subject. . . .

Under our constitutional system, there necessarily remains to the States, until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction although interstate commerce may be affected. *Minnesota Rate Cases*, 230, U.S. 352, 402. States are thus enabled to deal with local exigencies and to exert in the absence of conflict with federal legislation an essential protective power. And when Congress does exercise its paramount authority, it is obvious that Congress may determine how far its regulation shall go. There is no constitutional rule which compels Congress to occupy the whole field. Congress may circumscribe its regulation and occupy only a limited field. When it does so, state regulation outside that limited field and otherwise admissible is not forbidden or displaced. The principle is thoroughly established that the exercise by the State of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so "direct and positive" that the two acts cannot "be reconciled or consistently stand together." . . .

The application of the principle is strongly fortified where the State exercises its power to protect the lives and the health of its people. But

the principle is not limited to cases of that description. It extends to exertions of state power directed to more general purposes. . . .

In the instant case, in relation to the inspection of the hull and machinery of respondents' tugs, the state law touches that which the federal laws and regulations have left untouched. There is plainly no inconsistency with the federal provisions. . . . The fact that the federal regulations were numerous and elaborate does not extend them beyond the boundary they established. . . .

When the State is seeking to prevent the operation of unsafe and unseaworthy vessels in going to and from its ports, it is exercising a protective power akin to that which enables the State to exclude diseased persons, animals and plants. These are not proper subjects of commerce, and an unsafe and unseaworthy vessel is not a proper instrumentality of commerce. When the State is seeking to protect a vital interest, we have always been slow to find that the inaction of Congress has shorn the State of the power which it would otherwise possess. . . .

Third. The remaining question is whether the state law must fall in its entirety, not because of inconsistency with federal action, but because the subject is one as to which uniformity of regulation is required and hence, whether or not Congress has acted, the State is without authority. *Cooley v. Board of Wardens*, 12 How. 299, 319. . . .

The state law is a comprehensive code. While it excepts vessels which are subject to inspection under the laws of the United States, it has provisions which may be deemed to fall within the class of regulations which Congress alone can provide. For example, Congress may establish standards and designs for the structure and equipment of vessels, and may prescribe rules for their operation, which could not properly be left to the diverse action of the States. . . . But it does not follow that in all respects the state Act must fail.

We have found that in relation to the inspection of the hull and machinery of these tugs, in order to insure safety and seaworthiness, there is a field in which the state law could operate without coming into conflict with present federal laws. Is that a subject which necessarily and in all respects requires uniformity of regulation and as to which the State cannot act at all, although Congress has not acted? We hold that it is not. . . . Whether the State in a particular matter goes too far must be left to me determined when the precise question arises. . . .

SOUTH CAROLINA STATE HIGHWAY DEPARTMENT *v.* BARNWELL
BROTHERS, INC.Supreme Court of the United States. 1938.
303 U.S. 177.

Appeal from a final decree of a district court of three judges which enjoined the South Carolina State Highway Department, the State Public Service Commission and numerous state officers, from enforcing, as against the plaintiffs while engaged in interstate commerce on certain specified highways, a statute limiting the weight and width of motor trucks and "semi-trailer" trucks. . . .

MR. JUSTICE STONE delivered the opinion of the Court. . . .

Appellees include the original plaintiffs below, who are truckers and interstate shippers; the Interstate Commerce Commission; and certain others who were permitted to intervene as parties plaintiff. . . . Certain railroads interested in restricting the competition of interstate motor carriers were permitted to intervene as parties defendant.⁸

The trial court rested its decision that the statute unreasonably burdens interstate commerce, upon findings; not assailed here, that there is a large amount of motor truck traffic passing interstate in the southeastern part of the United States, which would normally pass over the highways of South Carolina, but which will be barred from the state by the challenged restrictions if enforced. . . .

To reach this conclusion the court weighed conflicting evidence and made its own determinations as to the weight and width of motor trucks commonly used in interstate traffic. . . . It found that interstate carriage by motor trucks has become a national industry; that from 85 to 90% of the motor trucks used in interstate transportation are 96 inches wide and of a gross weight, when loaded, of more than ten tons; that only four states prescribe a gross load weight as low as 20,000; and that the American Association of State Highway Officials and the National Conference of Street and Highway Safety in the Department of Commerce have recommended for adoption weight and width limitations in which weight is limited to axle loads of 16,000 to 18,000 pounds and width is limited to 96 inches. . . .

It also found that the gross weight of vehicles is not a factor to be considered in the preservation of concrete highways, but that the ap-

⁸ The statute in question limited gross weight to 20,000 pounds, and the width of trucks to 90 inches.—Ed.

propriate factor to be considered is wheel or axle weight; the vehicles engaged in interstate commerce are so designed and the pressure of their weight is so distributed by their wheels and axles that gross loads of more than 20,000 pounds can be carried over concrete roads without damage to the surface. . . .

While the constitutional grant to Congress of power to regulate interstate commerce has been held to operate of its own force to curtail state power in some measure, it did not forestall all state action affecting interstate commerce. Ever since *Wilson v. Black Bird Creek Marsh Co.*, 2 Pet. 245, and *Cooley v. Board of Port Wardens*, 12 How. 299, it has been recognized that there are matters of local concern, the regulation of which unavoidably involves some regulation of interstate commerce but which, because of their local character and their number and diversity, may never be fully dealt with by Congress. Notwithstanding the commerce clause, such regulation in the absence of Congressional action has for the most part been left to the states by the decisions of this Court, subject to the other applicable constitutional restraints.

The commerce clause, by its own force, prohibits discrimination against interstate commerce, whatever its form or method, and the decisions of this Court have recognized that there is scope for its like operation when state legislation nominally of local concern is in point of fact aimed at interstate commerce, or by its necessary operation is a means of gaining a local benefit by throwing the attendant burdens on those without the state. . . . It was to end these practices that the commerce clause was adopted. . . . The commerce clause has also been thought to set its own limitation upon state control of interstate rail carriers so as to prevent the subordination of the efficiency and convenience of interstate traffic to local service requirements.

But the present case affords no occasion for saying that the bare possession of power by Congress to regulate the interstate traffic forces the states to conform to standards which Congress might, but has not adopted, or curtails their power to take measures to insure the safety and conservation of their highways which may be applied to like traffic moving intrastate. Few subjects of state regulation are so peculiarly of local concern as is the use of state highways. There are few, local regulation of which is so inseparable from a substantial effect on interstate commerce. Unlike the railroads, local highways are built, owned and maintained by the state or its municipal subdivisions. The state has a primary and immediate concern in their safe and economical administration. The present regulations, or any others of like purpose, if they are to accomplish their end, must be applied alike to interstate and intrastate traffic both moving in large volume over the highways. The fact that they affect alike shippers in interstate and intrastate commerce in

large number within as well as without the state is a safeguard against their abuse.

From the beginning it has been recognized that a state can, if it sees fit, build and maintain its own highways, canals and railroads and that in the absence of Congressional action their regulation is peculiarly within its competence, even though interstate commerce is materially affected. *Minnesota Rate Cases*, 230 U.S. 352, 416. Congress not acting, state regulation of intrastate carriers has been upheld regardless of its effect upon interstate commerce. *Id.* With respect to the extent and nature of the local interests to be protected and the unavoidable effect upon interstate and intrastate commerce alike, regulations of the use of the highways are akin to local regulation of rivers, harbors, piers and docks, quarantine regulations, and game laws, which, Congress not acting, have been sustained even though they materially interfere with interstate commerce. . . .

In each of these cases regulation involves a burden on interstate commerce. But so long as the state action does not discriminate, the burden is one which the Constitution permits because it is an inseparable incident of the exercise of a legislative authority, which, under the Constitution, has been left to the states.

Congress, in the exercise of its plenary power to regulate interstate commerce, may determine whether the burdens imposed on it by state regulation, otherwise permissible, are too great, and may, by legislation designed to secure uniformity or in other respects to protect the national interest in the commerce, curtail to some extent the state's regulatory power. But that is a legislative, not a judicial function, to be performed in the light of the Congressional judgment of what is appropriate regulation of interstate commerce, and the extent to which, in that field, state power and local interests should be required to yield to the national authority and interest. In the absence of such legislation the judicial function, under the commerce clause as well as the Fourteenth Amendment, stops with the inquiry whether the state legislature in adopting regulations such as the present has acted within its province, and whether the means of regulation chosen are reasonably adapted to the end sought. . . .

Here the first inquiry has already been resolved by our decisions that a state may impose non-discriminatory restrictions with respect to the character of motor vehicles moving in interstate commerce as a safety measure and as a means of securing the economical use of its highways. In resolving the second, courts do not sit as legislatures, either state or national. They cannot act as Congress does when, after weighing all the conflicting interests, state and national, it determines when and how much the state regulatory power shall yield to the larger interests of a

national commerce. And in reviewing a state highway regulation where Congress has not acted, a court is not called upon, as are state legislatures, to determine what, in its judgment, is the most suitable restriction to be applied of those that are possible, or to choose that one which in its opinion is best adapted to all the diverse interests affected. . . . When the action of a legislature is within the scope of its power, fairly debatable questions as to its reasonableness, wisdom and propriety are not for the determination of courts, but for the legislative body, on which rests the duty and responsibility of decision. . . . This is equally the case when the legislative power is one which may legitimately place an incidental burden on interstate commerce. It is not any the less a legislative power committed to the states because it affects interstate commerce, and courts are not any the more entitled, because interstate commerce is affected, to substitute their own for the legislative judgment. . . . *Sproles v. Binford*, [286 U.S. 374.] 389, 390. . . .

Since the adoption of one weight or width regulation, rather than another, is a legislative not a judicial choice, its constitutionality is not to be determined by weighing in the judicial scales the merits of the legislative choice and rejecting it if the weight of evidence presented in court appears to favor a different standard. . . . Being a legislative judgment it is presumed to be supported by facts known to the legislature unless facts judicially known or proved preclude that possibility. Hence, in reviewing the present determination we examine the record, not to see whether the findings of the court below are supported by evidence, but to ascertain upon the whole record whether it is possible to say that the legislative choice is without rational basis. . . . Not only does the record fail to exclude that possibility, but it shows affirmatively that there is adequate support for the legislative judgment.

At the outset it should be noted that underlying much of the controversy is the relative merit of a gross weight limitation as against an axle or wheel weight limitation. . . . While the report of the National Conference on State and Highway Safety, on which the court below relied, suggested a wheel weight limitation of 8,000 or 9,000 pounds, it also suggested that a gross weight limitation might be adopted and should be subject to the recommended wheel limitation. But the conference declined to fix the amount of gross weight limitation. . . . The choice of a weight limitation based on convenience of application and consequent lack of need for rigid supervisory enforcement is for the legislature, and we cannot say that its preference for the one over the other is in any sense arbitrary or unreasonable. The choice is not to be condemned because the legislature prefers a workable standard, less likely to be violated than another under which the violations will probably be increased but more easily detected. It is for the legislature

to say whether the one test or the other will in practical operation better protect the highways from the risk of excessive loads. . . .

There was testimony before the court to support its conclusion that the highways in question are capable of sustaining without injury a wheel load of 8,000 or 9,000 pounds as against a wheel load of as much as 8,000 pounds, which would be possible under the statutory load limit of 20,000 pounds. . . . Much of this testimony appears to have been based on theoretical strength of concrete highways laid under ideal conditions, and none of it was based on an actual study of the highways of South Carolina or of the subgrade and other road building conditions which prevail there and which have a material bearing on the strength and durability of such highways. There is uncontradicted testimony that approximately 60% of the South Carolina standard paved highways in question were built without a longitudinal center joint which has since become standard practice . . . ; and that owing to the distribution of the stresses on concrete roads when in use, those without a center joint have a tendency to develop irregular longitudinal cracks. . . .

There is little in the record to mark any controlling distinction between the application of the gross load weight limitation to the motor truck and to the semi-trailer motor truck. . . . The record is without convincing evidence of the actual distribution, in practice, of the gross load weight over the wheels and axles of the permissible types of semi-trailer motor trucks, but this does not enable us to say that the legislature was without substantial ground for concluding that the relative advantages of a gross load over a wheel weight limitation are substantially the same for the two types, or that it could not have concluded that they were so nearly alike for regulatory purposes as to justify the adoption of a single standard for both, as a matter of practical convenience. Even if the legislature were to accept appellees' assumption that net load weights are, in practice, evenly distributed over the wheels supporting the load of a permissible semi-trailer so that with the statutory gross load limit the load on the rear axle would be about 8,000 pounds it might, as we have seen, also conclude that the danger point would then have been reached in the case of some 1,200 miles of concrete roads constructed without a center joint.

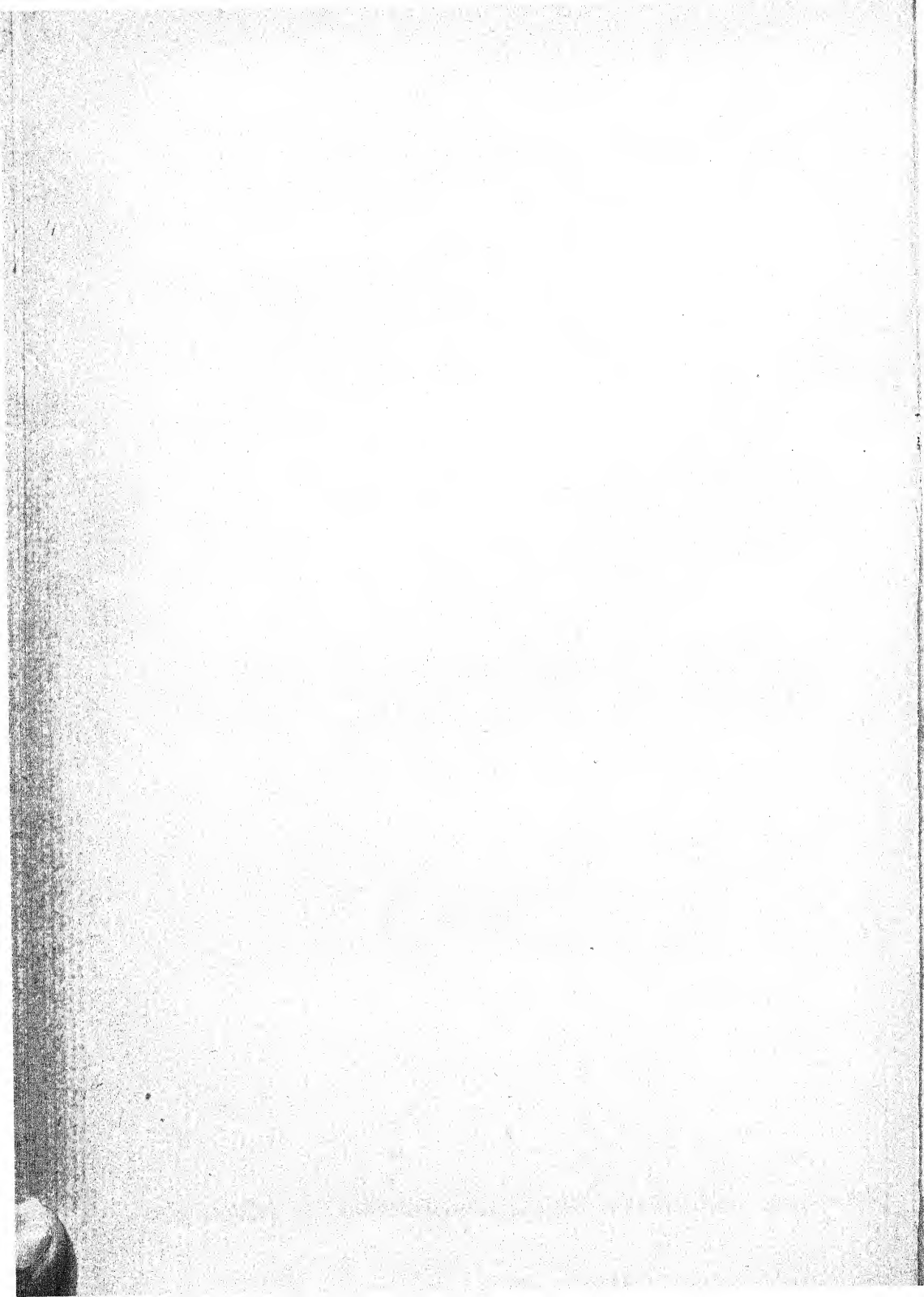
These considerations, with the presumption of constitutionality, afford adequate support for the weight limitation without reference to other items of the testimony tending to support it. Furthermore, South Carolina's own experience is not to be ignored. Before adoption of the limitation South Carolina had had experience with higher weight limits. In 1924 it had adopted a combined gross weight limit of 20,000 pounds for vehicles of four wheels or less, and an axle weight limit of 15,000 pounds. In 1930 it had adopted a combined gross weight limit of 12½

tons with a five ton axle weight limit for vehicles having more than two axles. . . . In 1931 it appointed a commission to investigate motor transportation in the state, to recommend legislation, and to report in 1932. The present weight limitation was recommended by the commission after a full consideration of relevant data, including a report by the state engineer who had constructed the concrete highways of the state and who advised a somewhat lower limitation as necessary for their preservation. The fact that many states have adopted a different standard is not persuasive. The conditions under which highways must be built in the several states, their construction and the demands made upon them, are not uniform. . . . The legislature, being free to exercise its own judgment, is not bound by that of other legislatures. . . .

Only a word need be said as to the width limitation. While a large part of the highways in question are from 18 to 20 feet in width, approximately 100 miles are only 16 feet wide. On all the use of a 96 inch truck leaves but a narrow margin for passing. On the road 16 feet wide it leaves none. The 90 inch limitation has been in force in South Carolina since 1920 and the concrete highways which it has built appear to be adapted to vehicles of that width. The record shows without contradiction that the use of heavy loaded trucks on the highways tends to force other traffic off the concrete surface onto the shoulders of the road adjoining its edges and to increase repair costs materially. It appears also that as the width of trucks is increased it obstructs the view of the highway, causing much inconvenience and increased hazard in its use. . . .

The regulatory measures taken by South Carolina are within its legislative power. They do not infringe the Fourteenth Amendment, and the resulting burden on interstate commerce is not forbidden.

MR. JUSTICE CARDOZO and MR. JUSTICE REED took no part in the consideration or decision of this case.



PART III

The Fiscal Powers of Government

CHAPTER VI

The Power of the States to Tax

THE JUDICIAL APPROACH TO TAXES

A state's power to tax is circumscribed broadly twice by limits which it can not traverse unless it is accompanied by three-fourths of the other members of the Union: specific constitutional provisions as construed by the federal judiciary inhibit it; and the grant of powers to the federal government restricts it. In the former instance, the subject of taxation is within the jurisdiction of the state; in the latter instance, the subject is not necessarily outside that jurisdiction, but it is immune to the exercise of the taxing power. Thus the primary question in the constitutional theory of taxation is that of jurisdiction to tax.

The quest for jurisdiction begins with locating the person, thing, or activity to be taxed. But a person may have a permanent residence in one place, a business in a place within another jurisdiction, and die while he is abroad. His will may be deposited anywhere, and the property he leaves may be scattered through several jurisdictions. Or, a corporation may be chartered in one state and have its main place of business within another, while it operates agencies in several other states, and does business over the continent. Questions of situs are not really either geographical or territorial, but questions of policy. Their solution calls for the exercise of a high degree of judicial statesmanship.

Once the taxable situs of a subject has been determined, the power to tax has not been discovered, though the primary question of jurisdiction may have been answered. A second search must now be undertaken—that for the purpose for which the tax is to be levied. The rule is, that a tax to be valid must be levied for a public purpose, but it is hardly more than a form of words. No court will accept without scrutiny a legislative declaration of purpose. It comes to pass, therefore, that the finding of a proper purpose is dependent upon the political and sociological views of the court sitting on the question.

Where the subject taxed is found to be within the jurisdiction of the state, the purpose of the tax will be discerned from the point of view of due process or of equal protection. Such an approach may even cover a subject confessedly within the stream of interstate commerce, by regarding the tax burden as an incidental or indirect regulation of such

commerce. It will be perceived that the question of power is not approached directly, but by way of the desirability of the tax. The power of government to promote the public welfare is inextricably dependent upon the functions of government in constitutional theory, and the judiciary will not see in the Constitution power to do that which can not be read into the Constitution. Or, if the power is so plainly present that it can not be denied, the unconstitutionality of the object—the purpose—must prohibit the exertion of such power.

The classic public purpose motivating taxation is, of course, the provision of revenue—a fiscal purpose. But from time immemorial taxation has also been used to encourage local, at the expense of foreign trade, and to guide trade into one channel while diverting it from another. The taxing power has been used, and sometimes successfully, to discriminate between forms of the same enterprise, as in the taxation of chain stores. It has been used to bar from the open market foods thought undesirable for one reason or another, as oleomargarine colored to look like butter, or narcotics. It has clearly been used to attain police objectives, to protect the public health or morals, and the public welfare. It has been used to force distribution of income and to maintain a predetermined price level. Taxation for particular purposes has been common, and the scope of the purpose has constantly broadened, although in simpler times revenues from taxation were deposited in a common fund from which moneys were withdrawn as needed. Not only may property of every sort be taxed, but so may privilege, activity, conduct, business and service. The concept of taxation is no longer confined to the collection of money; it includes regulation and spending.

The notion of due process is, as has been seen in preceding chapters, the notion of reasonableness. Now if a certain tax is oppressive, and if oppressiveness is unreasonable, then an oppressive tax fails in due process. But whether or not a tax is oppressive depends upon several considerations. The tax rate is one of these; but beyond it lie considerations of need and of value, and of the relation of the individual to society. As taxation is grounded upon the necessity for providing the means for meeting governmental expenses, so the concept of public purpose is founded upon the assumption that the individual is taxed as of right in return for the government's protection of his person, his property, and his welfare. But a theory of such individualism does not, obviously, include taxation to provide old age pensions for persons whose welfare can not in any practical sense impinge upon his own. Only some collectivist theory of society can find within the powers of government taxation for such a purpose. The theory that a tax represents an equivalent return for services rendered can be no more than a formula if the Constitution is to be held abreast of society. The due process clause of

the Fourteenth Amendment has this virtue, that within its ample folds the Supreme Court may, if it is so minded, cover with the Constitution social experimentation under the state jurisdictions.

The position of the Supreme Court is one of subtle difficulty. It must either disregard the social concepts which prevail in the minds of a majority of its members, and substitute the concepts which actuate each legislature whose statutes come before it; or else it must pursue a course harmonious with the opinions prevailing within itself. To take the first course is to be willing to sustain as reasonable, legislation which a majority of its members think to be arbitrary, on grounds which have failed to convince the Court. Yet if the second course is taken, the Court may be in practical effect placing itself in opposition to public opinion. At the one extreme, it may convert the Constitution into a catch-all; at the other, it may transform itself into a legislature. Under either course a legislature may reach and pass its constitutional limitations. The judicial problem is concerned with the selection of the test which will show where to draw the line. On the one hand, there is that reason which inheres in the application of substantial justice; on the other there is the authority of the case law, the rule of the precedents.

To remove a subject or matter of taxation from the jurisdiction to tax, it is necessary that it should either be an instrumentality of government, or that it should be within the concept of the commerce power and so free of burden from state authority, or that it should be clearly outside the jurisdiction of the state levying the tax. A taxable subject may have a precarious immunity because it has been taxed already by another state and is therefore protected by the doctrine forbidding double taxation; but this immunity is, as it were, fortuitous, and may lapse.

Both the status of governmental agencies and the conceptual development of interstate commerce rest on postulates distinctly their own. It is for that reason that taxation falling within their range has been treated in other chapters in this collection of cases. Their effect upon the power of the states to tax is characteristic. Cases on the same subject falling within this chapter may be distinguished from those other cases mentioned on the ground that here the approach is from the point of view of the taxing power, rather than from that of governmental instrumentalities or interstate commerce. The problems to be considered now are those of situs, of due process, of equal protection of the laws, and of the presence of federal jurisdiction.

The cases to come tell their story so clearly that it does not seem necessary to tie them by name into the pattern of the foregoing comments. One point, however, calls for specific comment. Ever since the *State Freight Tax* case, 15 Wallace, 232 (1873), it has been part of the formal doctrine of the Supreme Court that a state is forbidden by the

Constitution to lay a direct tax burden upon interstate commerce. The doctrine was forged in a line of cases in the field of interstate transportation and communication and stemming from the *State Freight Tax* case. As the Court put it in that case, the principle has been that "It is of national importance that over the subject there should be but one regulating power, for if one State can directly tax persons or property passing through it, or tax them indirectly by levying a tax upon their transportation, every other may, and thus commercial intercourse between States remote from each other may be destroyed." *Western Live Stock v. Bureau of Revenue* initiates a trend away from this doctrine.¹ It suggests a shift of the judicial approach away from established dogma to the pragmatic test of practical effects. Under this test the tax is scrutinized to see whether it (a) is one which may be imposed by another state on the same activity or transaction and thus (b) risk a cumulative or multiple tax burden. The *Western Live Stock* case thus paved the way for the Court's present support of the use and sales taxes. This support became official, so to say, with the *Berwind-White* decision. For the majority opinion there, "the controlling factor is the practical effect and operation of a tax, not its form or the technical manner in which it is imposed."²

The formula for the new doctrine is not hard to find. The Court first seeks a taxable event. If it finds it, the Court then applies the maxim that interstate commerce must pay its fair share of the tax burden. But this maxim is to be applied subject to the multiple-burden test. Nevertheless, for all its simplicity, the presence of formidable dissenting opinions shows that the effects of this test are not clear. The pragmatic test is by no means entrenched in the Court's jurisprudence. Perhaps the surest thing to say is that the Court is impressed by the efforts of the states to open new sources of revenue, and is desirous of taking a realistic view of the development of the nation's business.

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¹ William B. Lockhart: "Gross Receipts Taxes on Interstate Transportation and Communication," *Harv. Law Rev.*, vol. 57 (1943-44), p. 40. This whole paragraph is based on this article.

² Lockhart, *op. cit.*, p. 93.

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The Situs of the Thing Taxed

UNION REFRIGERATOR TRANSIT CO. v. KENTUCKY, 199 U.S. 194 (1905). MR. JUSTICE BROWN. . . . In this case the question is directly presented whether a corporation organized under the laws of Kentucky is subject to taxation upon its tangible personal property, permanently located in other States, and employed there in the prosecution of its business. . . . The power of taxation, indispensable to the existence of every civilized government, is exercised upon the assumption of an equivalent rendered to the taxpayer in the protection of his person and property, in adding to the value of such property, or in the creation and maintenance of public conveniences in which he shares, such, for instance, as roads, bridges, sidewalks, pavements, and schools for the education of his children. If the taxing power be in no position to render these services, or otherwise to benefit the person or property taxed, and such property be wholly within the taxing power of another State, to which it may be said to owe an allegiance and to which it looks for protection, the taxation of such property within the domicile of the owner partakes rather of the nature of an extortion than a tax. . . . The rule is that in classifying property for taxation some benefit to the property taxed is a controlling consideration. . . . It is often said protection and payment of taxes are correlative obligations. . . .

It is also essential to the validity of a tax that the property shall be within the territorial jurisdiction of the taxing power. . . .

The argument against the taxability of land within the jurisdiction of another State applies with equal cogency to tangible personal property beyond the jurisdiction. It is not only beyond the sovereignty of the taxing State, but does not and cannot receive protection under its laws. True, a resident may receive an income from such property, but the same may be said of real estate within a foreign jurisdiction. Whatever may be the rights of the State with respect to the taxation of such income, it is clearly beyond its power to tax the land from which the income is derived. . . .

Respecting this, there is an obvious distinction between the tangible and intangible property, in the fact that the latter is held secretly; that there is no method by which its existence or ownership can be ascertained in the State of its *situs*, except perhaps in the case of mortgages or shares of stock. So if the owner be discovered, there is no way by which he can be reached by process in a State other than that of his domicile, or the collection of the tax otherwise enforced. In this class of cases the tendency of modern authorities is to apply the maxim *mobilia sequuntur personam*, and to hold that the property may be taxed at the domicile of the owner as the real *situs* of the debt, and also, more particularly in the case of mortgages, in the State where the property is retained. Such have been the repeated rulings of this court. . . .³

³ See *Burnet v. Brooks*, 288 U.S. 378 (1933), below.

If this occasionally results in double taxation, it much oftener happens that this class of property escapes altogether. . . .

The arguments in favor of the taxation of intangible property at the domicile of the owner have no application to tangible property. The fact that such property is visible, easily found and difficult to conceal, and the tax readily collectible, is so cogent an argument for its taxation at its *situs*, that of late there is a general consensus of opinion that it is taxable in the State where it is permanently located and employed and where it receives its entire protection, irrespective of the domicile of the owner. . . .

NEW YORK *ex rel.* COHN *v.* GRAVES.

Supreme Court of the United States. 1937.
300 U.S. 308.

MR. JUSTICE STONE delivered the opinion of the Court.

This case presents the question whether a state may constitutionally tax a resident upon income received from rents of land located without the state and from interest on bonds physically without the state and secured by mortgages upon lands similarly situated.

Section 351 of Article 16 of the New York Tax Law imposes a tax upon the "entire net income" of residents of the state. . . . The same section enumerates among the items of taxable income "rent (including rent derived from real property situated outside the state) it being intended to include all the foregoing items without regard to the source thereof. . . ."

Appellant, a resident of New York, brought the present *certiorari* proceeding in the courts of New York to review a determination of the State Tax Commission, appellees, denying her application for a refund of state income taxes assessed and paid for the years 1931 and 1932, so far as the taxes were attributable to rents received from appellant from New Jersey land, and interest paid on bonds secured by mortgaged real estate in New Jersey, where the bonds and mortgages were physically located. A ground for recovery of the tax assigned by appellant's petition was that the tax was in substance and effect a tax on real estate and tangible property located without the state, in violation of the Fourteenth Amendment of the Constitution of the United States. Judgment for appellant was reversed by the New York Court of Appeals. . . . The case comes here on appeal. . . .

The stipulation of facts on which the case was tried in the state court does not indicate that appellant's income has been taxed by New Jersey, and it does not define the precise nature of her interest in the properties producing the income. . . .

Income from rents. That the receipt of income by a resident of the territory of a taxing sovereignty is a taxable event is universally recognized. Domicile itself affords a basis for such taxation. Enjoyment of the privileges of residence in the state and the attendant right to invoke the protection of its laws are inseparable from responsibility for sharing the costs of government. . . . A tax measured by the net income of residents is an equitable method of distributing the burdens of government among those who are privileged to enjoy its benefits. . . .

Neither the privilege nor the burden is affected by the character of the source from which the income is derived. For that reason income is not necessarily clothed with the tax immunity enjoyed by its source. A state may tax its residents upon net income from a business whose physical assets, located wholly without the state, are beyond its taxing power, *Lawrence v. State Tax Comm'n*, [286 U. S. 276]. . . . It may tax net income from bonds held in trust and administered in another state, *Maguire v. Trefry*, [253 U.S. 12], although the taxpayer's equitable interest may not be subjected to the tax, *Safe Deposit & Trust Co. v. Virginia*, [280 U.S. 83]. It may tax net income from operations in interstate commerce, although a tax on the commerce is forbidden, *United States Glue Co. v. Oak Creek*, 247 U.S. 321. . . .

Neither analysis of the two types of taxes, nor consideration of the bases upon which the power to impose them rests, supports the contention that a tax on income is a tax on the land which produces it. The incidence of a tax on income differs from that of a tax on property. Neither tax is dependent upon the possession by the taxpayer of the subject of the other. His income may be taxed, although he owns no property, and his property may be taxed, although it produces no income. The two taxes are measured by different standards, the one by the amount of income received over a period of time, the other by the value of the property at a particular date. Income is taxed but once; the same property may be taxed recurrently. The tax on each is predicated upon different governmental benefits; the protection offered to the property in one state does not extend to the receipt and enjoyment of income from it in another.

It would be pressing the protection which the due process clause throws around the taxpayer too far to say that because a state is prohibited from taxing land which it neither protects nor controls, it is likewise prohibited from taxing the receipt and command of income from the land by its resident, who is subject to its control and enjoys the benefits of its laws. . . . These considerations lead to the conclusion that income derived from real estate may be taxed to the recipient at the place of his domicile, irrespective of the location of the land, and that the state court rightly upheld the tax.

Nothing which was said or decided in *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, calls for a different conclusion. There the question for decision was whether a federal tax on income derived from rents of land is a direct tax requiring apportionment under Art. 1, # 2, Cl. 3 of the Constitution. In holding that the tax was "direct," the Court did not rest its decision upon the ground that the tax was a tax on the land, or that it was subject to every limitation which the Constitution imposes on property taxes. It determined only that for purposes of apportionment there were similarities in the operation of the two kinds of tax which made it appropriate to classify both as direct, and within the constitutional command. . . .

It is by a parity of reasoning that the immunity of income-producing instrumentalities of one government, state or national, from taxation by the other, has been extended to the income. It was thought that the tax, whether on the instrumentality or on the income produced by it, would equally burden the operations of government. . . . But as we have seen, it does not follow that a tax on land and a tax on income derived from it are identical in their incidence or rest upon the same basis of taxing power, which are controlling factors in determining whether either tax infringes due process. . . .

Income from bonds secured by New Jersey mortgages. What has been said of the power to tax income from land without the state is decisive of the objection to the taxation of the income from interest on bonds because they are secured by mortgages on land without the state. . . . The stipulation of facts discloses only that the bonds and mortgages were located in New Jersey. . . . The burden rested on the taxpayer to present further facts which would establish a "business situs." . . .

MR. JUSTICE BUTLER, dissenting.

. . . . By our decisions it is established that a tax on income received for the use of land is in legal effect a tax upon the land itself. *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 580-581; 158 U.S. 601, 627-628, 637. . . .

MR. JUSTICE McREYNOLDS concurs in this opinion.

CONNECTICUT GENERAL LIFE INSURANCE CO. v. JOHNSON.

Supreme Court of the United States. 1938.

303 U.S. 77.

MR. JUSTICE STONE delivered the opinion of the Court.

Appellant is a Connecticut corporation, admitted to do an insurance business in California. In addition to its business conducted within that

state it has entered into contracts with other insurance corporations likewise licensed to do business in California, reinsuring them against loss on policies of life insurance effected by them in California and issued to residents there. These reinsurance contracts were entered into in Connecticut where the premiums were paid and where the losses, if any, were payable. The question for decision is whether a tax laid by California on the receipt by appellant in Connecticut of the reinsurance premiums during the years 1930 and 1931, infringes the due process clause of the Fourteenth Amendment. . . .

Section 14 of Art. XIII of the California constitution, as supplemented by Act of March 5, 1921 lays upon every insurance company doing business within the state an annual tax of 2.6% "upon the amount of the gross premiums received upon its business done in this state, less return premium and reinsurance in companies or associations authorized to do business in this state. . . ." The Supreme Court of California has declared [3 Cal. (2d) 84] that the policy of the state, expressed in the constitutional provision, is "to avoid double taxation without any loss of revenue to the state." To accomplish that end the deduction of reinsurance premiums paid to companies authorized to do business within the state is allowed, it is said, on the theory that the benefit of the deduction will be passed on to the reinsurer who, being authorized to do business within the state, may be taxed on the reinsurance premiums as a means of equalizing the tax and as an offset against the benefit of the deduction which he ultimately enjoys. . . .

It is said that the state could have lawfully accomplished its purpose if the statute had further stipulated that the deduction should be allowed only in those cases where the reinsurance is effected in the state or the reinsurance premiums paid there. But as the state has placed no such limitation on the allowance of deductions, the end sought can be attained only if the receipt by appellant of the reinsurance premiums paid in Connecticut upon the Connecticut policies is within the reach of California's taxing power. Appellee argues that it is, because the reinsurance transactions are so related to business carried on by appellant in California as to be a part of it and properly included in the measure of the tax; and because, in any case, no injustice is done to appellant since the effect of the statute as construed is to redistribute the tax, which the state might have exacted from the original insurers but did not, by assessing it upon appellant to the extent to which it has received the benefit of the allowed deductions.

But the limits of the state's legislative jurisdiction to tax, prescribed by the Fourteenth Amendment, are to be ascertained by reference to the incidence of the tax upon its objects rather than the ultimate thrust of the economic benefits and burdens of transactions within the state.

As a matter of convenience and certainty, and to secure a practically just operation of the constitutional prohibition, we look to the state power to control the objects of the tax as marking the boundaries of the power to lay it. Hence it is that a state which controls the property and activities within its boundaries of a foreign corporation admitted to do business there may tax them. But the due process clause denies to the state power to tax or regulate the corporation's property and activities elsewhere. . . . It follows that such a tax, otherwise unconstitutional, is not converted into a valid exaction merely because the corporation enjoys outside the state economic benefits from transactions within it, which the state might but does not tax, or because the state might tax the transactions which the corporation carries on outside the state if it were induced to carry them on within.

Appellant, by its reinsurance contracts, undertook only to indemnify the insured companies against loss upon their policies written in California. The reinsurance involved no transactions or relationship between appellant and those originally insured, and called for no act in California. . . . No act in the course of their formation, performance or discharge, took place there. The performance of those acts was not dependent upon any privilege or authority granted by it, and California laws afforded them no protection.

The grant by the state of the privilege of doing business there and its consequent authority to tax the privilege do not withdraw from the protection of the due process clause the privilege, which California does not grant, of doing business elsewhere. . . . All that appellant did in effecting reinsurance was done without the state. . . . The tax cannot be sustained either as laid on property, business done, or transactions carried on within the state, or as a tax on a privilege granted by the state.

MR. JUSTICE CARDOZO took no part in the consideration or decision of this case.

MR. JUSTICE BLACK, dissenting. . . .

Public Purpose

SHAFFER *v.* CARTER, 252 U.S. 37 (1920). MR. JUSTICE PITNEY. . . . In our system of government the States have general dominion, and, saving as restricted by particular provisions of the Federal Constitution, complete dominion over all persons, property, and business transactions within their borders; they assume and perform the duty of preserving and protecting all such persons, property, and business, and, in consequence, have the power normally pertaining to governments to resort to all reasonable forms of taxation in order to defray the governmental expenses. Certainly they are not

restricted to property taxation, nor to any particular form of excises. In well-ordered society, property has value chiefly for what it is capable of producing, and the activities of mankind are devoted largely to making recurrent gains from the use and development of property, from tillage, mining, manufacture, from the employment of human skill and labor, or from a combination of some of these; gains capable of being devoted to their own support, and the surplus accumulated as an increase of capital. That the State, from whose laws property and business and industry derive the protection and security without which production and gainful occupation would be impossible, is debarred from exacting a share of those gains in the form of income taxes for the support of the government, is a proposition so wholly inconsistent with fundamental principles as to be refuted by its mere statement. . . .

And we deem it clear, upon principle as well as authority, that just as a State may impose general income taxes upon its own citizens and residents whose persons are subject to its control, it may, as a necessary consequence, levy a duty of like character, and not more onerous in its effect, upon incomes accruing to non-residents from their property or business within the State, or their occupations carried on therein; enforcing payment, so far as it can, by the exercise of a just control over persons and property within its borders. . . .

That a State, consistently with the Federal Constitution, may not prohibit the citizens of other States from carrying on legitimate business within its borders like its own citizens, of course is granted; but it does not follow that the business of non-residents may not be required to make a ratable contribution in taxes for the support of the government. On the contrary, the very fact that a citizen of one State has the right to hold property or carry on an occupation or business in another is a very reasonable ground for subjecting such non-resident, although not personally yet to the extent of his property held, or his occupation or business carried on therein, to a duty to pay taxes not more onerous in effect than those imposed under like circumstances upon citizens of the latter State. . . .

GREEN v. FRAZIER.

Supreme Court of the United States. 1920.
253 U.S. 233.

MR. JUSTICE DAY delivered the opinion of the Court.

This is an action by taxpayers of the State of North Dakota against Lynn J. Frazier, Governor, John N. Hagan, Commissioner of Agriculture and Labor, William Langer, Attorney General, and Obert Olson, State Treasurer, and the Industrial Commission of that State to enjoin the enforcement of certain state legislation. The defendants . . . constitute the Industrial Commission, created by the Act of February 25, 1919. . . .

The legislation involved consists of a series of acts passed under the authority of the state constitution, which are: (1) An act creating an

Industrial Commission of North Dakota which is authorized to conduct and manage on behalf of that State certain utilities, industries, enterprises and business projects, to be established by law. . . . To that end certain powers and authority are given to the Commission, among others: the right of eminent domain; to fix the buying price of things bought, and the selling price of things sold incidental to the utilities, industries, enterprises and business projects, and to fix rates and charges for services rendered, having in mind the accumulation of a fund with which to replace in the general funds of the State the amount received by the Commission under appropriations made by the act; to procure the necessary funds for such utilities, industries, enterprises and business projects by negotiating the bonds of the State. . . . (2) The Bank of North Dakota Act, which establishes a bank under the name of "The Bank of North Dakota," operated by the State. The Industrial Commission is placed in control of the operation and management of the bank. . . . (3) An act providing for the issuing of bonds of the State in the sum of \$2,000,000, the proceeds of which are to constitute the capital of the Bank of North Dakota. . . . The earnings of the bank are to be paid to the State Treasurer. . . . (4) An act providing for the issuing of bonds in the sum of not exceeding \$10,000,000. . . . These bonds are to be issued for the purpose of raising money to procure funds for the Bank of North Dakota to replace such funds as may have been employed by it from time to time in making loans upon first mortgages upon real estate. . . . (5) An act declaring the purpose of the State of North Dakota to engage in the business of manufacturing and marketing farm products, and to establish a warehouse, elevator, and flour mill system. . . . The Industrial Commission is placed in control. . . . (6) An act providing for the issuing of bonds of the State of North Dakota in a sum not exceeding \$5,000,000. . . . The bonds are to be issued and sold for the purpose of carrying on the business. . . . (7) The Home Building Act declares the purpose of the State to engage in the enterprise of providing homes for its residents and to that end to establish a business system operated by it. . . . The price of town homes is placed at \$5,000, and of farm homes at \$10,000. A bond issue of \$2,000,000 is provided for.

There are certain principles which must be borne in mind in this connection, and which must control the decision of this court upon the federal question herein involved. This legislation was adopted under the broad power of the State to enact laws raising by taxation such sums as are deemed necessary to promote purposes essential to the general welfare of its people. Before the adoption of the Fourteenth Amendment this power of the State was unrestrained by any federal authority. That amendment introduced a new limitation upon state power into the fed-

eral Constitution. The States were forbidden to deprive persons of life, liberty or property without due process of law. What is meant by due process of law this court has had frequent occasion to consider, and has always declined to give a precise meaning, preferring to leave its scope to judicial decisions when cases from time to time arise. *Twining v. New Jersey*, 211 U.S. 78, 100.

The due process of law clause contains no specific limitation upon the right of taxation in the States, but it has come to be settled that the authority of the States to tax does not include the right to impose taxes for merely private purposes. *Fallbrook Irrigation District v. Bradley*, 164 U.S. 155. . . .

Accepting this as settled by the former adjudications of this court, the enforcement of the principle is attended with the application of certain rules equally well settled.

The taxing power of the States is primarily vested in their legislatures, deriving their authority from the people. When a state legislature acts within the scope of its authority it is responsible to the people, and their right to change the agents to whom they have intrusted the power is ordinarily deemed a sufficient check upon its abuse. When the constituted authority of the State undertakes to exert the taxing power, and the question of the validity of its action is brought before this court, every presumption in its favor is indulged, and only clear and demonstrated usurpation of power will authorize judicial interference with legislative action.

In the present instance under the authority of the Constitution and laws prevailing in North Dakota the people, the legislature, and the highest court of the State have declared the purpose for which these several acts were passed to be of a public nature, and within the taxing authority of the State. With this united action of people, legislature and court, we are not at liberty to interfere unless it is clear beyond reasonable controversy that rights secured by the Federal Constitution have been violated. What is a public purpose has given rise to no little judicial consideration. Courts, as a rule, have attempted no judicial definition of a "public" as distinguished from a "private" purpose, but have left each case to be determined by its own peculiar circumstances. . . . Questions of policy are not submitted to judicial determination, and the courts have no general authority of supervision over the exercise of discretion which under our system is reposed in the people or other departments of government. *Chicago, Burlington & Quincy R. R. Co. v. McGuire*, 219 U.S. 549, 569; *German Alliance Insurance Co. v. Kansas*, 233 U.S. 389.

With the wisdom of such legislation, and the soundness of the economic policy involved we are not concerned. Whether it will result in

ultimate good or harm it is not within our province to inquire.

We come now to examine the grounds upon which the Supreme Court of North Dakota held this legislation not to amount to a taking of property without due process of law. The questions involved were given elaborate consideration in that court, and it held, concerning what may in general terms be denominated the "banking legislation," that it was justified for the purpose of providing banking facilities, and to enable the State to carry out the purposes of the other acts, of which the Mill & Elevator Association Act is the principal one. It justified the Mill & Elevator Association Act by the peculiar situation in the State of North Dakota, and particularly by the great agricultural industry of the State. It estimated from facts of which it was authorized to take judicial notice, that 90 per cent. of the wealth produced by the State was from agriculture, and stated that upon the prosperity and welfare of that industry other businesses and pursuits carried on in the State were largely dependent; that the State produced 125,000,000 bushels of wheat each year. The manner in which the present system of transporting and marketing this great crop prevents the realization of what are deemed just prices was elaborately stated. It was affirmed that the annual loss from these sources (including the loss of fertility to the soil and the failure to feed the by-products of grain to stock within the State), amounted to fifty-five millions of dollars to the wheat raisers of North Dakota. It answered the contention that the industries involved were private in their nature, by stating that all of them belonged to the State of North Dakota, and therefore the activities authorized by the legislation were to be distinguished from business of a private nature having private gain for its objectives.

As to the Home Building Act, that was sustained because of the promotion of the general welfare in providing homes for the people, a large proportion of whom were tenants moving from place to place. It was believed and affirmed by the Supreme Court of North Dakota that the opportunity to secure and maintain homes would promote the general welfare, and that the provisions of the statutes to enable this feature of the system to become effective would redound to the general benefit.

As we have said, the question for us to consider and determine is whether this system of legislation is violative of the federal Constitution because it amounts to a taking of property without due process of law. The precise question herein involved so far as we have been able to discover has never been presented to this court. The nearest approach to it is found in *Jones v. City of Portland*, 245 U.S. 217, in which we held that an act of the State of Maine authorizing cities or towns to establish and maintain wood, coal and fuel yards for the purpose of selling these necessities to the inhabitants of cities and towns, did not deprive

taxpayers of due process of law within the meaning of the Fourteenth Amendment. In that case we reiterated the attitude of this court towards state legislation, and repeated what had been said before, that what was or was not a public use was a question concerning which local authority, legislative and judicial, had especial means of securing information to enable them to form a judgment; and particularly, that the judgment of the highest court of the State declaring a given use to be public in its nature, would be accepted by this court unless clearly unfounded. . . . We think the principle of that decision is applicable here.

This is not a case of undertaking to aid private institutions by public taxation as was the fact in *Citizens' Savings & Loan Association v. Topeka*, 20 Wall. 655, 665. In many instances States and municipalities have in late years seen fit to enter upon projects to promote the public welfare which in the past have been considered entirely within the domain of private enterprise.

Under the peculiar conditions existing in North Dakota, which are emphasized in the opinion of its highest court, if the State sees fit to enter upon such enterprises as are here involved, with the sanction of its Constitution, its legislature and its people, we are not prepared to say that it is within the authority of this court, in enforcing the observance of the Fourteenth Amendment, to set aside such action by judicial decision.

The Property Tax

FIRST BANK STOCK CORP. v. MINNESOTA.

Supreme Court of the United States. 1937.
301 U.S. 234.

MR. JUSTICE STONE delivered the opinion of the Court.

This appeal from a judgment of the Supreme Court of Minnesota . . . involves the question whether appellant, a Delaware corporation doing business in Minnesota, may be required, consistently with the due process clause of the Fourteenth Amendment, to pay a property tax laid by Minnesota upon appellant's shares of stock in Montana and North Dakota state banking corporations.

The trial court concluded that, as the shares are lawfully taxed by Montana and North Dakota, it would be a denial of due process to tax them in Minnesota. The Supreme Court of the state reversed, holding that as appellant has acquired a commercial domicile within the state, . . . they are rightly taxed there rather than in Montana or North Dakota. . . .

Appellant is qualified to do business in Minnesota, and in fact transacts its corporate business and fiscal affairs there. It maintains a business office within the state and holds there its meetings of stockholders, directors and their executive committee. . . .

Through a wholly-owned subsidiary corporation, organized and doing business in Minnesota, it maintains a compensated service for the banks which it controls. It offers advice as to their accounting practices, makes recommendations concerning loans, commercial paper and interest rates, and makes suggestions regarding their purchase and sale of securities. It also plans for them advertising campaigns, and supplies advertising material. Appellant thus maintains within the state an integrated business of protecting its investments in bank shares. . . .

Appellant is to be regarded as legally domiciled in Delaware, the place of its organization, and as taxable there upon its intangibles , at least in the absence of activities identifying them with some other place as their "business situs." But it is plain that the business which appellant carries on in Minnesota, or directs from its offices maintained there, is sufficiently identified with Minnesota to establish a "commercial domicile" there, and to give a business situs there, for purposes of taxation, to intangibles which are used in the business or are incidental to it, and have thus "become integral parts of some local business." *Wheeling Steel Corp. v. Fox*, 298 U.S. 193, 210. . . .

The doctrine that intangibles may be taxed at their business situs, as distinguished from the legal domicile of their owner, has usually been applied to obligations to pay money, acquired in the course of a localized business. . . . But it is equally applicable to shares of corporate stock which, because of their use in a business of the owner, may be treated as localized, for purposes of taxation, at the place of the business. . . . Appellant's entire business in Minnesota is founded on its ownership of the shares of stock and their use as instruments of corporate control. They are as much "integral parts" of the local business as accounts receivable in a merchandising business, or the bank accounts in which the proceeds of the accounts receivable are deposited upon collection. . . .

Appellant does not deny that it is subject to taxation in Minnesota on some intangibles. . . . It does not challenge the tax imposed on its shares of stock in corporations organized and doing business without the state, other than those in the Montana and North Dakota banks. It says that these states have adopted the only feasible scheme of taxation of the shares of state banks which will admit of a state property tax on national bank shares, since R. S. # 5219 (12 U. S. C. # 548), permits shares of national banks to be taxed only by the state where the bank does business, and then only if they are not assessed "at a greater rate than other moneyed capital in the hands of individual citizens

... coming into competition with the business of national banks." ... Both states assess for property taxation the shares of national banks doing business, within their limits and assess in like manner the shares of state banks, and thus avoid discrimination in taxation between shares of national and of state banks.

Appellant argues that every state may establish a tax situs within the state for shares of stock in its own banking corporations, and that Montana and North Dakota have done so by providing, in pursuance of their scheme for the local taxation of banking corporations, that the shares shall be taxable there. ... It insists that as the shares are properly taxable by the respective states of their origin, and as due process forbids the imposition of a property tax upon intangibles in more than one state, they cannot be taxed in Minnesota.

The logic is inexorable if the premises are accepted. But we do not find it necessary to decide whether taxation of the shares in Montana or North Dakota is foreclosed by sustaining the Minnesota tax. Nor need we inquire whether a non-resident shareholder, by acquiring stock in a local corporation, so far subjects his investment to the control and laws of the state which has created the corporation as to preclude any objection, on grounds of due process, to the taxation of the shares there, even though they are subject to taxation elsewhere, at their business situs. We leave those questions open. It is enough for present purposes that this Court has often upheld and never denied the constitutional power to tax shares of stock at the place of the domicil of the owner. ... And it has fully recognized that the business situs of an intangible affords an adequate basis for fixing a place of taxation. ...

The rule that property is subject to taxation at its situs, within the territorial jurisdiction of the taxing state, readily understood and applied with respect to tangibles, is in itself meaningless when applied to intangibles which, since they are without physical characteristics, can have no location in space. ... The resort to a fiction by the attribution of a tax situs to an intangible is only a means of symbolizing, without fully revealing, those considerations which are persuasive grounds for deciding that a particular place is appropriate for the imposition of the tax. *Mobilia sequuntur personam*, which has won unqualified acceptance when applied to the taxation of intangibles, *Blodgett v. Silberman*, 277 U.S. 1, 9-10, states a rule without disclosing the reasons for it. But we have recently had occasion to point out that enjoyment by the resident of a state of the protection of its laws is inseparable from responsibility for sharing the costs of its government, and that a tax measured by the value of rights protected is but an equitable method of distributing the burdens of government among those who are privileged to enjoy its benefits. ...

The economic advantages realized through the protection, at the place of domicile, of the ownership of rights in intangibles, the value of which is made the measure of the tax, bear a direct relationship to the distribution of burdens which the tax effects. These considerations support the taxation of intangibles at the place of domicile, at least where they are not shown to have acquired a business situs elsewhere, as a proper exercise of the power of government. Like considerations support their taxation at their business situs, for it is there that the owner in every practical sense invokes and enjoys the protection of the laws, and in consequence realizes the economic advantages of his ownership. We cannot say that there is any want of due process in the taxation of the corporate shares in Minnesota, irrespective of the extent of the control over them which the due process clause may save to the states of incorporation.

MR. JUSTICE BUTLER took no part in the consideration or decision of this case.

HANOVER FIRE INSURANCE CO. *v.* CARR.

Supreme Court of the United States. 1926.
272 U.S. 494.

[Section 30 of an Illinois statute enacted in 1869 provided that each foreign fire insurance company doing business within the State should make out an annual return of its net receipts for the year. These receipts were made subject to the same rate of taxation applicable to other personal property, and they were exacted in place of licenses where the tax was paid. There was also a tax of 2% of gross premiums.

The General Revenue Act of 1898 provided that one half of the actual value of personal property should be treated as the assessed value for purposes of taxation. For many years the practice in making tax returns had been to mark down the actual value to 60% of the market value of the personal property, and then reduce this amount by 50% to reach the statutory assessed value. Thus the tax due amounted to only 30% of the full market value of the property.]

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.

This is a writ of error to the judgment of the Supreme Court of Illinois, affirming a decree of the Superior Court of Cook County dismissing the bill of the Hanover Fire Insurance Company, a corporation of New York, against Patrick J. Carr, County Treasurer and ex-

officio tax collector of Cook County, Illinois. The prayer was for an injunction to prevent the distraint of the property of the complainant under a warrant for the collection of \$10,678.50 as taxes due. . . .

This suit presents the question of the validity of the assessment made by taxing officers under section 30 for the year 1922. The Supreme Court of Illinois in an opinion announced June 20, 1923, near the close of the year for which the assessment of 1922 was made, held that the tax under section 30 was an occupation tax and that no reduction should be permitted to foreign insurance companies in the assessment for taxation of their annual net receipts. The superior court found that the actual amount of net cash receipts of the complainant company was \$90,824, less by \$45,000 than the amount reported by the board of review, that its decree forbade the collection of more than \$7,184.18, instead of \$10,678.50, for which the warrant had issued, but denied further relief. The complainant insisted that under the previous practice and proper construction of section 30 as a property tax, with due equalization and debasement, the tax assessed should have been \$2,155.24, and that this, if anything, is all that should be collected from it. . . .

The petitioner is an insurance corporation organized under the laws of the State of New York. By its charter it is authorized to do a business of insurance against the hazard of fire, marine perils, and other similar lines of insurance against specified hazards. There are in Illinois domestic insurance companies which do business in all of such risks. In 1914, the Supreme Court held that the only insurance companies whose receipts come within section 30 are foreign fire, marine, and inland navigation insurance companies doing business in the State. . . .

The situation then is that a foreign fire, marine, and inland navigation insurance company like the petitioner, must pay at a rate per centum equivalent to that imposed on personal property a tax on the cash amount or 100 per cent. of its net receipts from all its insurance business. A domestic fire, marine, and inland navigation insurance company pays no tax on its net receipts from any kind of insurance. Both pay on their personal property other than net receipts as of a fixed date in each year on an assessment of 30 per cent. of its full value.

The Supreme Court of Illinois for many years held the payment of a tax on the net receipts was a tax on personal property. It is quite apparent from reading these cases that in practice the net receipts were treated as personal property and their assessment was by equalization and debasement reduced from full value as all other personal property, until the decisions in 1921 and [1923].

The general principle upon which the Supreme Court of Illinois holds the tax complained of herein to be valid, is that the payment of it

is part of the condition which the petitioner as a foreign insurance company is obliged to perform in order to maintain and retain its right to do business in the State. It was settled in the *Bank of Augusta v. Earle*, 13 Pet. 519, *Paul v. Virginia*, 8 Wall. 168, that foreign corporations cannot do business in a State except by the consent of the State; that the State may exclude them arbitrarily or impose such conditions as it will upon their engaging in business within its jurisdiction. But there is a very important qualification to this power of the State, the recognition and enforcement of which are shown in a number of decisions of recent years. That qualification is that the State may not exact as a condition of the corporation's engaging in business within its limits that its rights secured to it by the Constitution of the United States may be infringed. This is illustrated in respect to the breach of the commerce clause of the Constitution by the cases of *Sioux Remedy Co. v. Cope*, 235 U.S. 197, 203, and *Looney v. Crane Co.*, 245 U.S. 178, 188. . . . It is illustrated in cases in which a provision of a state law revoking the license of a foreign corporation for exercising its constitutional right to remove suits brought against them from the state courts to the federal courts has been held void, *Terral v. Burke Construction Co.*, 257 U.S. 529; in cases in which the State has vainly attempted to subject foreign corporations to a payment of a tax which is a tax, not only on the property of the corporation in the State, but also on its property without the State, in violation of the due process clause of the Fourteenth Amendment, *Western Union Telegraph Co. v. Kansas*, 216 U.S. 1 ; and finally in cases of a class to which it is contended the present case belongs, where a tax or license law operates to deny to the foreign corporation the equal protection of the laws, *Southern Railway Co. v. Greene*, 216 U.S. 400; *Air Way Corporation v. Day*, 266 U.S. 71.

It is insisted that we must accept the construction of section 30 by the state Supreme Court, and as the tax levied is sustained by its construction, and has been held by the court to be an indispensable condition upon which the petitioner may continue to do business in Illinois, this court is bound by both those conclusions.

It is true that the interpretation put upon such a tax law of a State by its Supreme Court is binding upon this court as to its meaning; but it is not true that this court, in accepting the meaning thus given, may not exercise its independent judgment in determining whether, with the meaning given, its effect would not involve a violation of the federal Constitution. . . .

In subjecting a law of the State which imposes a charge upon foreign corporations to the test whether such a charge violates the equal protection clause of the Fourteenth Amendment, a line has to be drawn between

the burden imposed by the State for the license or privilege to do business in the State and the tax burden which, having secured the right to do business, the foreign corporation must share with all the corporations and other taxpayers of the State. With respect to the admission fee, so to speak, which the foreign corporation must pay to become a quasi citizen of the State and entitled to equal privileges with citizens of the State, the measure of the burden is in the discretion of the State and any inequality as between the foreign corporation and the domestic corporation in that regard does not come within the inhibition of the Fourteenth Amendment; but after its admission, the foreign corporation stands equal, and is to be classified, with domestic corporations of the same kind.

In this class of cases, therefore, the question of the application of the equal protection clause turns on the stage at which the foreign corporation is put on a level with domestic corporations in engaging in business within the State. To leave the determination of such a question finally to a state court would be to deprive this court of its independent judgment in determining whether a federal constitutional limitation has been infringed. While we may not question the meaning of the tax law as interpreted by the state court in the manner and effect in which it is to be enforced, we must reëxamine the question passed upon by the state court as to whether the law complained of is a part of the condition upon which admission to do business in the State is permitted and is merely a regulating license by the State to protect the State and its citizens in dealing with such corporation, or whether it is a tax law for the purpose of securing contributions to the revenue of the State as they are made by other taxpayers of the State. . . .

It is plain that compliance with section 30 is not a condition precedent to permission to do business in Illinois. . . .

The view of the court seems to be that the constitutional necessity for equal application of the laws of the state to foreign and domestic corporations properly engaged in business is avoided if only the State provides that failure to comply with the laws during the period or at the end of the period for which the license runs justifies a revocation of the license pending the period, or a refusal to grant a new license for the following year. We do not think the State may thus relieve itself from granting the equal protection of its laws to a foreign company which has met the conditions precedent to its becoming a quasi domestic citizen. . . . By compliance with the valid conditions precedent, the foreign insurance company is put on a level with all other insurance companies of the same kind, domestic or foreign within the State, and tax laws made to apply after it has been so received into the State are to be considered laws enacted for the purpose of raising revenue for the State and must

conform to the equal protection clause of the Fourteenth Amendment. . . .

We thus reach the question whether a tax imposed upon foreign fire, marine, and inland navigation insurance companies on the net receipts of all their business is a denial of the equal protection of the laws when domestic insurance companies pay no taxes on such net receipts. Under the previous decisions of the Supreme Court of Illinois, when the net receipts were treated as personal property and the assessment thereon as a personal property tax subjected to the same reductions for equalization and debasement, it might well have been said that there was no substantial inequality as between domestic corporations and foreign corporations, in that the net receipts were personal property acquired during the year and removed by foreign companies out of the State, and could be required justly to yield a tax fairly equivalent to that which the domestic companies would have to pay on all their personal property including their net receipts or what they were invested in. It was this view, doubtless, which led to the acquiescence by the state authorities and the foreign insurance companies in such a construction of section 30 and in the practice under it. But an occupation tax imposed upon 100 per cent. of the net receipts of foreign insurance companies admitted to do business in Illinois is a heavy discrimination in favor of domestic insurance companies of the same class and in the same business which pay only a tax on the assessment of personal property at a valuation reduced to one-half of 60 per cent. of the full value of that property. It is a denial of the equal protection of the laws. . . .

MADDEN *v.* KENTUCKY.

Supreme Court of the United States. 1940.
309 U.S. 83.

MR. JUSTICE REED delivered the opinion of the Court. . . .

The issue is whether a state statute which imposes on its citizens an annual ad valorem tax on their deposits in banks outside of the state at the rate of fifty cents per hundred dollars and at the same time imposes on their deposits in banks located within the state a similar ad valorem tax at the rate of ten cents per hundred dollars is obnoxious to the stated clauses of the Fourteenth Amendment. . . .

John E. Madden died in November, 1929, a citizen and resident of Fayette County, Kentucky. On several prior assessment dates, July 1 in Kentucky, Mr. Madden had on deposit in New York banks a considerable amount of funds. These deposits had not been reported for the purposes

of taxation in Kentucky. That state brought suit against Mr. Madden's executor to have these deposits assessed as omitted property and to recover an ad valorem tax of fifty cents per hundred dollars as of July 1 of each year, together with interest and penalties. The executor used as one defense against this claim the contention that a tax on deposits in banks outside of Kentucky at a higher rate than the tax upon bank deposits within Kentucky would abridge decedent's privileges and immunities as a citizen of the United States, deprive him of his property right and the liberty to keep money on deposit outside of Kentucky without due process of law, and deny to him equal protection of the law in violation of the Fourteenth Amendment. The Court of Appeals passed upon the constitutional questions submitted because of the difference in taxing rate between Kentucky deposits and out-of-state deposits. It approved the classification as permissible under the due process and equal protection clauses and refused to accept the argument that its interpretation of the statutes violated the privileges and immunities clause.

I. Classification.—The broad discretion as to classification possessed by a legislature in the field of taxation has long been recognized. This Court fifty years ago concluded that "the Fourteenth Amendment was not intended to compel the State to adopt an iron rule of equal taxation," *Bell's Gap R. Co. v. Pennsylvania*, 134 U.S. 232, 237, and the passage of time has only served to underscore the wisdom of that recognition of the large area of discretion which is needed by a legislature in formulating sound tax policies. Traditionally classification has been a device for fitting tax programs to local needs and usages in order to achieve an equitable distribution of the tax burden. It has, because of this, been pointed out that in taxation, even more than in other fields, legislatures possess the greatest freedom in classification. *Citizens' Telephone Co. v. Fuller*, 229 U.S. 322, 329. Since the members of a legislature necessarily enjoy a familiarity with local conditions which the Court cannot have, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes. See the opinion of Mr. Justice Brandeis in *Louisville Gas & Electric Co. v. Coleman*, 277 U.S. 32, 42, 46-47. The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.

Paying proper regard to the scope of a legislature's powers in these matters, the insubstantiality of appellant's claim that he has been denied equal protection or due process of law by the classification is at once apparent. When these statutes were adopted in 1917 during a general revision of Kentucky's tax laws, the chief problem facing the legislature was the formulation of an enforceable system of intangible taxation. By placing the duty of collection on local banks, the tax on local deposits

was made almost self-enforcing. The tax on deposits outside the state, however, still resembled that on investments in *Watson v. State Comptroller*, the collection of which was said to depend "either upon (the taxpayer's) will or upon the vigilance and discretion of the local assessors." 254 U.S. 122, 124. Here as in the *Watson* case the classification may have been "founded in 'the purposes and policy of taxation.'" The treatment accorded the two kinds of deposits may have resulted from the differences in the difficulties and expenses of tax collection.

II. *Privileges and Immunities*.—The appellant presses urgently upon us the argument that the privileges and immunities clause of the Fourteenth Amendment of the Constitution of the United States forbids the enforcement by the Commonwealth of Kentucky of this enactment which imposes upon the testator taxes five times as great on money deposited in banks outside the State as it does on money of others deposited in banks within the state. The privilege or immunity which appellant contends is abridged is the right to carry on business beyond the lines of the State of his residence, a right claimed as appertaining to national citizenship.

There is no occasion to attempt again an exposition of the views of this Court as to the proper limitations of the privileges and immunities clause. There is a very recent discussion in *Hague v. C. I. O.*, 307 U.S. 496. The appellant purports to accept as sound the position stated as the view of all the justices concurring in the *Hague* decision. This position is that the privileges and immunities clause protects all citizens against abridgment by states of rights of national citizenship as distinct from the fundamental or natural rights inherent in state citizenship. . . . The Court has consistently refused to list completely the rights which are covered by the clause, though it has pointed out the type of rights protected. We think it quite clear that the right to carry out an incident to a trade, business or calling such as the deposit of money in banks is not a privilege of national citizenship.

In the states, there reposes the sovereignty to manage their own affairs except only as the requirements of the Constitution otherwise provide. Within these constitutional limits the power of the state over taxation is plenary. An interpretation of the privileges and immunities clause which restricts the power of the states to manage their own fiscal affairs is a matter of gravest concern to them. It is only the emphatic requirements of the Constitution which properly may lead the federal courts to such a conclusion.

Appellant relies upon *Colgate v. Harvey*, 296 U.S. 404, as a precedent to support his argument that the present statute is not within the limits of permissible classification and violates the privileges and immunities clause. In view of our conclusions, we look upon the decision in that

case as repugnant to the line of reasoning adopted here. As a consequence, *Colgate v. Harvey* must be and is overruled.

MR. CHIEF JUSTICE HUGHES concurs. . . .

MR. JUSTICE ROBERTS, and with him MR. JUSTICE McREYNOLDS, dissented.

NORTHWEST AIRLINES, INC. v. MINNESOTA.

Supreme Court of the United States. 1944.
322 U.S. 292.

MR. JUSTICE FRANKFURTER announced the conclusion and judgment of the Court.

The question before us is whether the Commerce Clause or the Due Process Clause of the Fourteenth Amendment bars the State of Minnesota from enforcing the personal property tax it has laid on the entire fleet of airplanes owned by the petitioner and operated by it in interstate transportation. . . .

Northwest Airlines is a Minnesota corporation and its principal place of business is St. Paul. It is a commercial airline carrying persons, property and mail on regular fixed routes predominantly within the territory comprising Illinois, Minnesota, North Dakota, Montana, Oregon, Wisconsin, and Washington. For all the planes St. Paul is the home port registered with the Civil Aeronautics Authority, under whose certificate of convenience and necessity Northwest operates. At six of its scheduled cities, Northwest operates maintenance bases, but the work of rebuilding and overhauling the planes is done in St. Paul. . . .

The tax in controversy is for the year 1939. All of Northwest's planes were in Minnesota from time to time during that year. All were, however, continuously engaged in flying from State to State, except when laid up for repairs. . . . Northwest's scheduled route mileage in Minnesota was 14% of its total scheduled route mileage, and the scheduled plane mileage was 16% of that scheduled. It based its personal property tax return for 1939 on the number of planes in Minnesota on May 1, 1939. Thereupon the appropriate taxing authority in Minnesota assessed a tax against Northwest on the basis of the entire fleet coming into Minnesota. For that additional assessment this suit was brought. . . . A new phase of an old problem led us to bring the case here. . . .

Minnesota is here taxing a corporation for all its property within the State during the tax year no part of which receives permanent protection

from any other State. The benefits given to Northwest by Minnesota and for which Minnesota taxes are concretely symbolized by the fact that Northwest's principal place of business is in St. Paul and that St. Paul is the "home port" of all its planes. . . . No other State can claim to tax as the State of the legal domicile as well as the home State of the fleet, as a business fact. No other State is the State which gave Northwest the power to be as well as the power to function as Northwest functions in Minnesota. . . .

Such being the case, it is clearly ruled by *N. Y. Central & H. R. R. Co. v. Miller*, [202 U.S. 584]. Here, as in that case, a corporation is taxed for all its property within the State during the tax year none of which was "continuously without the State during the whole tax year." Therefore the doctrine of *Union Transit Co. v. Kentucky*, 199 U.S. 194, does not come into play. The fact that Northwest paid personal property taxes for the year 1939 upon "some proportion of its full value" of its airplane fleet in some other States does not abridge the power of taxation of Minnesota as the home State of the fleet in the circumstances of the present case. . . .

The doctrine of tax apportionment for instrumentalities engaged in interstate commerce introduced by *Pullman's Car Co. v. Pennsylvania*, 141 U.S. 18, is here inapplicable. The principle of that case is that a non-domiciliary State may tax an interstate carrier "engaged in running railroad cars into, through and out of the State, and having at all times a large number of cars within the State . . . by taking as the basis of assessment such proportion of its capital stock as the number of miles of railroad over which its cars are to run within the State bears to the whole number of miles in all the States over which its cars are run." *Union Transit Co. v. Kentucky*, *supra*, at 206. . . . The continuous protection by a State other than the domiciliary State—that is, protection throughout the tax year—has furnished the constitutional basis for tax apportionment in these interstate commerce situations, and it is on that basis that the tax laws have been framed and administered.

The taxing power of the domiciliary State has a very different basis. It has the power to tax because it is the State of domicile and no other State is Congress could of course exert its controlling authority over commerce . . . and exclude a domiciliary State from authority which it otherwise would have because it is the domiciliary State. But no judicial restriction has been applied against the domiciliary State except when property . . . is permanently situated in a State other than the domiciliary State.

Such was the unanimous decision in the *Miller* case or the *Miller* case decided nothing. The present case is precisely the case which Mr. Justice Holmes assumed the *Miller* case to be. By substituting Minnesota for

New York we have inescapably the facts of the present case: "Suppose, then, that the State of Minnesota had taxed the property directly, there was nothing to hinder its taxing the whole of it. It is true that it has been decided that property, even of a domestic corporation, cannot be taxed if it is permanently out of the State. . . . But it has not been decided, and it could not be decided, that a State may not tax its own corporations for all their property within the State during the tax year, even if every item of that property should be taken successively into another State for a day, a week, or six months, and then brought back. Using the language of domicile, which now so frequently is applied to inanimate things, the State of origin remains the permanent situs of the property, notwithstanding its occasional excursions to foreign parts." *N. Y. Central & H. R. R. Co. v. Miller, supra*, at 596-597. . . .

To introduce a new doctrine of tax apportionment as a limitation upon the hitherto established taxing power of the home State is not merely to indulge in constitutional innovation. It is to introduce practical dislocation into the established taxing systems of the States. . . . Although a part of the taxing systems of this country, the rule of apportionment is beset with friction, waste and difficulties, but at all events it grew out of, and has established itself in regard to, land commerce. To what extent it should be carried over to the totally new problems presented by the very different modes of transportation and communication that the airplane and the radio have already introduced, let alone the still more subtle and complicated technological facilities that are on the horizon, raises questions that we ought not to anticipate. . . .

MR. JUSTICE BLACK, concurring. . . .

MR. JUSTICE JACKSON, concurring. . . .

Certainly today flight over a state either casually or on regular routes and schedules confers no jurisdiction to tax. . . .

I cannot consider that to alight out of the skies onto a landing field and take off again into the air confers any greater taxing jurisdiction on a state than for a ship for the same purposes to come alongside a wharf on the water and get under way again. . . .

It seems more than likely that no solution of the competition among states to tax this transportation agency can be devised by the judicial process without legislative help. . . .

MR. CHIEF JUSTICE STONE, dissenting. . . .

But if petitioner's airplanes, which are taxable for some portion of their value in each of the states in which they carry on interstate trans-

portation over fixed routes and regular schedules, are also taxed for their full value by Minnesota, the state of the domicile, it is evident that merely because they are engaged in interstate commerce they may be subjected to multiple taxation far in excess of their value. . . .

The case thus sharply presents in a new form the old question whether the commerce clause affords any protection against multiple state taxation of the physical facilities used in interstate transportation which, because they move from state to state, are exposed to full taxation in each, save only as the due process and commerce clauses may prevent. . . .

Of controlling significance in this case are certain elementary propositions, so long accepted and applied by this Court that they cannot be said to be debatable here, although they seem not to have been taken into account in deciding this case either here or in the Minnesota Supreme Court. The first is that the constitutional basis for the state taxation of the airplanes, which are chattels, is their physical presence within the taxing state, and not the domicile of the owner. . . .

This Court has accordingly held invalid state taxation of vehicles of interstate transportation unless the tax is equitably apportioned to the use of the vehicles within the state compared to their use without, whether the tax is laid by the state of the domicile or another. . . .

Upon like principles this Court has consistently held that a tax laid by a state on gross receipts from interstate commerce, which is comparable to a property tax at full value on vehicles of interstate transportation, violates the commerce clause unless equitably apportioned. . . .

In many [cases] the tax was held invalid although imposed by the state of the domicile of the taxpayer. . . .

It cannot be said either in point of practicality or of legal theory that anything is added to Minnesota's power to tax by reason of the fact that all of petitioner's aircraft are registered with the Civil Aeronautics Authority with St. Paul, Minnesota, designated as their "home port." Section 501 of the Civil Aeronautics Act, 52 Stat. 1005. . . .

Nor is it of any significance for tax purposes whether Minnesota is "as a business fact the home state of the fleet." . . .

Moreover, the difficulties of applying to aircraft a rule of taxation at a "home port" are essentially those which have led, long since, to the abandonment of the idea by this Court as applied to vessels. . . .

Even if we could say on this record that Minnesota and it alone can be regarded as the "home state," we have no assurance that in taxing planes operated by other and more complex business organizations, one state will have any greater claim to that designation than several others, and the Court's opinion furnishes no test to guide in the choice among them, if choice has any relevance. Nor does it say that the power to tax

vehicles of interstate transportation at the domicile or the "home port" is exclusive. Obviously, unless it is deemed to be thus exclusive it does not foreclose any state within which the planes move on fixed routes from imposing a like tax burden. And if it is deemed to be exclusive the other states must be denied their just claims to collect an equitable tax on property regularly used within them in carrying on an interstate business. . . .

Respondent places its reliance on *N. Y. Central & H. R. R. Co. v. Miller*, *supra*. . . . The decision proceeded on the assumption, not tenable here but which the facts of that case were thought to support, that the cars were not shown to have moved so regularly or continuously in any state or group of states outside the domicile as to gain a tax situs there. . . .

The present case raises the question which the *Miller* case found it unnecessary to decide but which this Court has consistently answered by requiring the apportionment of a tax on vehicles of interstate transportation according to their regular use within and without the taxing state. In the *Miller* case it appeared that the cars moved not only over the carrier's own tracks, but also were interchanged with other railroads, and thus, as the Court pointed out, moved about almost at random throughout the United States. No evidence was offered tending to show in what states the cars moved. . . . The Court was thus not called upon to consider whether New York could tax the cars if they moved between New York and other named states with such regularity that an "average of cars" could be said to be continuously so moving in those other states. Here, on the other hand, it is stipulated and found that all of petitioner's planes are "continuously engaged in flying from state to state in the course of operations" and that those operations are on regular schedules along fixed routes through eight states. . . . Here, as was the case in *Pullman's Car Co. v. Pennsylvania*, *supra*, the same planes are "running into, through, and out of" each of the states along petitioner's route and an "average" of planes is continuously within each of those states. . . .

Both before and since the *Miller* case this Court has ruled that vehicles of interstate transportation regularly moving to and from the state of domicile from and to other states acquire a tax situs in the latter, and that the state of domicile cannot constitutionally levy on them an unapportioned property tax. *Union Transit Co. v. Kentucky*, *supra*; *Johnson Oil Co. v. Oklahoma*, *supra*; *Nashville, C. & St. L. Ry. v. Browning*, *supra*. . . . Those cases should control now.⁴ . . .

The tax now sustained is so obviously disproportionate to the protec-

⁴ These cases are, respectively, to be found in 199 U.S. 194; 290 U.S. 158; and 310 U.S. 362.—Ed.

tion afforded to the taxed property by the taxing state as to place a constitutionally intolerable burden on interstate commerce. . . .

MR. JUSTICE ROBERTS, MR. JUSTICE REED, and MR. JUSTICE RUTLEDGE join in this dissent.

The License Tax

WELTON v. MISSOURI.

Supreme Court of the United States. 1876.
91 U.S. 275.

Error to the Supreme Court of Missouri.

[The State of Missouri enacted a law requiring that every person dealing in "merchandise, except books, charts, maps, and stationery, which are not the growth, produce or manufacture of this State" must be licensed by the State. Welton was convicted of selling sewing machines made outside the State without a license. The law further declared such persons to be peddlers, and was confined to this class of travelling dealer. Welton came within the classification.]

MR. JUSTICE FIELD delivered the opinion of the court. . . .

The license charge exacted is sought to be maintained as a tax upon a calling. It was held to be such a tax by the Supreme Court of the State; a calling, says the court, which is limited to the sale of merchandise not the growth or product of the State.

The general power of the State to impose taxes in the way of licenses upon all pursuits and occupations within its limits is admitted, but, like all other powers must be exercised in subordination to the requirements of the Federal Constitution. Where the business or occupation consists in the sale of goods, the license tax required for its pursuit is in effect a tax upon the goods themselves. If such a tax be within the power of the State to levy, it matters not whether it be raised directly from the goods, or indirectly from them through the license to the dealer; but, if such a tax conflict with any power vested in Congress by the Constitution of the United States, it will not be any the less invalid because enforced through the form of a personal license. . . .

The license tax exacted by the State of Missouri from dealers in goods which are not the product or manufacture of the State, before they can be sold from place to place within the State, must be regarded as a tax upon such goods themselves; and the question presented is, whether leg-

isolation thus discriminating against the products of other States in the conditions of their sale by a certain class of dealers is valid under the Constitution of the United States. It was contended in the state courts, and it is urged here, that this legislation violates that clause of the constitution which declares that Congress shall have the power to regulate commerce with foreign nations and among the several States. The power to regulate conferred by that clause upon Congress is one without limitation; and to regulate commerce is to prescribe rules by which it shall be governed,—that is, the conditions upon which it shall be conducted; to determine how far it shall be free and untrammelled, how far it shall be burdened by duties and imposts, and how far it shall be prohibited.

Commerce is a term of the largest import. It comprehends intercourse for the purposes of trade in any and all its forms. . . . The power to regulate it embraces all the instruments by which such commerce may be conducted. So far as some of these instruments are concerned, and some subjects which are local in their operation, it has been held that the States may provide regulations until Congress acts with reference to them; but where the subject to which the power applies is national in its character, or of such a nature as to admit of uniformity of regulation, the power is exclusive of all state authority. . . .

The power which insures uniformity of commercial regulation must cover the property which is transported as an article of commerce from hostile or interfering legislation, until it has mingled with and become a part of the general property of the country, and subjected like it to similar protection, and to no greater burdens. If, at any time before it has thus become incorporated into the mass of property of the State or nation, it can be subjected to any restrictions by state legislation, the object of investing the control in Congress may be entirely defeated. If Missouri can require a license tax for the sale by travelling dealers of goods which are the growth, product, or manufacture of other States or countries, it may require such license tax as a condition of their sale from ordinary merchants, and the amount of the tax will be a matter resting exclusively in its discretion.

The power of the State to exact a license tax of any amount being admitted, no authority would remain in the United States or in this court to control its action, however unreasonable or oppressive. Imposts operating as an absolute exclusion of the goods would be possible, and all the evils of discriminating state legislation, favorable to the interests of one State and injurious to the interests of other States and countries, which existed previous to the adoption of the Constitution, might follow, and the experience of the last fifteen years shows would follow, from the action of some of the States.

There is a difficulty, it is true, in all cases of this character, in drawing

the line precisely where the commercial power of Congress ends and the power of the State begins. A similar difficulty was felt by this court in *Brown v. Maryland*. . . .

. . . . It is sufficient to hold now that the commercial power continues until the commodity has ceased to be the subject of discriminating legislation by reason of its foreign character. That power protects it, even after it has entered the State, from any burdens imposed by reason of its foreign origin. The act of Missouri encroaches upon this power in this respect, and is therefore, in our judgment, unconstitutional and void. . . .

FOX V. STANDARD OIL COMPANY OF NEW JERSEY

Supreme Court of the United States. 1935.

294 U.S. 87.

MR. JUSTICE CARDOZO delivered the opinion of the Court.

The controversy hinges upon the meaning and validity of the chain store license tax of West Virginia in its application to distributing plants and service stations for the sale of gasoline and kindred products.

On March 8, 1933, the legislature of West Virginia passed a law whereby all persons and corporations operating or maintaining a store as therein defined were required to obtain an annual license from the state tax commissioner. The license fee was graduated according to the number of stores. Upon one store the fee was to be \$2; upon two stores or more, but not to exceed five, the fee was to be \$5 for each additional store; upon six or more, but not to exceed ten, \$10 for each additional store; upon each store in excess of ten, but not to exceed fifteen, \$20; upon each in excess of fifteen, but not to exceed twenty, \$30; upon each in excess of twenty, but not to exceed thirty, \$35; upon each in excess of thirty, but not to exceed fifty, \$100; upon each in excess of fifty, but not to exceed seventy-five, \$200; and upon each in excess of seventy-five, \$250.

Appellee, complainant in the court below, is a Delaware corporation, engaged in the business of refining, transporting and distributing petroleum products. It owns or controls in West Virginia 949 service or filling stations, and 54 bulk plants, a total of 1003. Of the 949 stations, there are 101 which are described as "company owned"; these are both owned and operated by the company itself. "Leased outlets," 388 in number, and "vending privilege outlets," 460 in number, are leased by the complainant and operated by agents under commission contracts. By concession its control over these outlets is so complete as to amount to operation within

the meaning of the statute. Finally there are 54 "bulk or distributing plants," maintained chiefly for the storage of petroleum products to be distributed to the stations, but in part as a source of supply from which deliveries are made to buyers.

Chains for the sale of gasoline have units many times more numerous than chains for other purposes. The longest "general commodity" chain is that of the Great Atlantic & Pacific Tea Company with 198 stores within the boundaries of West Virginia. Not only are the gasoline units more numerous, but the sales from any one unit are, comparatively speaking, small, as must always be the case when subdivision is so minute. The result is to cast upon the complainant and upon competing chains in the same business a burden much heavier, both absolutely and relatively to earnings, than any that is borne by others. This is brought out clearly through statistical tables in the record. The store license fees from all sources during the year 1933 amounted to \$569,693. Of this total, stores other than gasoline stations contributed \$83,525 (single stores \$21,723, and multiple stores \$61,802). Single gasoline stations, maintained by independent dealers, 2,000 in number, contributed \$5,000, and chain gasoline stations \$481,168, or 84.46% of the whole. Five oil companies including the complainant paid \$476,171 or 83.5%, and the complainant alone paid \$240,173 or 42.16%. Other tables supply the data for a comparison between the business done by the gasoline chains and that of chains for other purposes. If we look to the year 1932, the latest year for which complete figures are forthcoming, 2,453 gasoline chain stations did an aggregate business of \$15,198,638, or 4.6% of the total chain business of the state, yet they would have paid 84.46% of the tax if the law had been in force during that year; 1,889 general retail stores in chain organizations did a total business of \$75,454,257, or 22.9% of the whole, and would have paid 10.7% of the tax, this because the number of units was relatively small. In 1932 the average gross revenue of the complainant's gasoline stations was \$26,822 for each of the company-owned stations, and \$3,892 for each of the agency stations, the company-owned stations making by far the better showing. During the same year the average net income for company stations was \$1,782.78 (it had been more than double in 1931), and for agency stations only \$89.75. Upon that basis a tax of \$250 would have left a profit for the one group, but a loss for the other. In the computation of this loss, a word may be of use as to the bookkeeping methods in vogue in the complainant's business. The complainant's practice has been to bill the gasoline to its stations at the current market prices, as if there were a sale to strangers. Such a mode of segregation, unless corrected by other data, will give at times a partial picture of the economic situation. If the price at which the oil is billed includes a reasonable profit for refining and transport-

ing, the business may show a gain when viewed in all its parts, though the later work of marketing is carried on at cost or less. Stations scattered far and wide address a mass appeal to customers, and thus stimulate them to buy at the sign that has made itself familiar. True, the complainant lost money in the process of refining from 1930 to 1933, but for anything that is shown, the loss had its origin in the general economic depression prevailing in those years. Even so, there can be no denial that service filling stations, when organized in chains, bear a heavier and harsher burden than chains whose units are fewer and yet individually larger.

Impatient of that burden, the complainant brought this suit in June, 1933, to restrain the State Tax Commissioner from paying into the treasury of the state the sum of \$240,173.50 paid under protest as the license taxes of the year. . . . In its bill of complaint the complainant took the ground that the exactions were illegal, first, because the gasoline stations were not stores within the meaning of the statute, and, second, because even though they were, the imposition of taxes was a denial to the complainant of immunities secured by the equal protection clause and the due process clause of the Fourteenth Amendment. . . . [The court below] enjoined the payment of the contested fees into the treasury of the State (*sic*), and ordered restitution. An appeal to this court followed.

First. . . .

There is no doubt that goods, wares and merchandise of a kind, i.e., gasoline and other petroleum products, and even tires and other automobile accessories, are sold by the complainant and its agencies at its plants and service stations. This satisfies the test of the statute, and subjects the seller to the tax. . . .

Second. The statute in its application to the complainant and others similarly situated does not deny to the taxpayer the equal protection of the laws.

The inquiry divides itself into two branches which call for separate consideration. Is a series of filling stations a chain of such kind as to be subject to a different measure of taxation from stations in separate ownership?

(1) We think a series of gasoline stations maintained in a single ownership has the benefit of chain organization in such a sense and measure as to fall within the scope of the decisions of this court in *State Board of Tax Commissioners v. Jackson*, 283 U.S. 527, and *Liggett Co. v. Lee*, 288 U.S. 517. . . . The method is deceptive, yet many of the chief benefits found in the structure of other integrated chains will be discovered to be present here.

We have here abundant capital; standardization in equipment and

display; superior management; more rapid turnover; uniformity in store management; special accounting methods; and a unified sales policy coordinating the diverse units. . . . Ownership or control of a host of well-appointed depots, uniform in design and color, has put the chains in a position to bring home to the consuming public the knowledge of their wares and of the quality of their service in a way far beyond the capacity of the independent dealer with one station or a few. . . . More important is this, that the effect of multitudinous agencies, reaching into every corner, and yet subject to regulation at a centre, is to fix a uniform retail price to which independents must conform as the price of their existence. They are independent in name only, for the chain sets the pace, and even in competing they are subject to its mastery. . . .

(2) Chains of gasoline stations being subject like other chains to a graduated tax, the question remains whether the rates are so oppressive as to amount to arbitrary discrimination or to unlawful confiscation.

When the power to tax exists, the extent of the burden is a matter for the discretion of the lawmakers. The subject was fully considered in *Magnano Co. v. Hamilton*, 292 U.S. 40, decided at the last term. . . . A chain, as we have seen, is a distinctive business species, with its own capacities and functions. Broadly speaking its opportunities and powers become greater with the number of the component links; and the greater they become, the more far-reaching are the consequences, both social and economic. For that reason the state may tax the large chains more heavily than the small ones, and upon a graduated basis. . . . Not only may it do this, but it may make the tax so heavy as to discourage multiplication of the units to an extent believed to be inordinate, and by the incidence of the burden develop other forms of industry. . . . In principle there is no distinction between such an exercise of power and the statute upheld in *Magnano Co. v. Hamilton*, *supra*, whereby sales of butter were fostered and sales of oleomargarine repressed. A motive to build up through legislation the quality of men may be as creditable in the thought of some as a motive to magnify the quantity of trade. Courts do not choose between such values in adjudging legislative powers. They put the choice aside as beyond their lawful competence. . . . The tax now assailed may have its roots in an erroneous conception of the ills of the body politic or of the efficacy of such a measure to bring about a cure. We have no thought in anything we have written to declare it expedient or even just, or for that matter to declare the contrary. We deal with power only. . . .

MR. JUSTICE VAN DEVANTER, MR. JUSTICE McREYNOLDS, MR. JUSTICE SUTHERLAND, and MR. JUSTICE BUTLER [dissent].

GREAT ATLANTIC & PACIFIC TEA CO. *v.* GROSJEAN.Supreme Court of the United States. 1937.
301 U.S. 412.

[By Act 51, of 1934, the legislature of Louisiana levied a tax on the operation of chain stores, one of which should be doing business within the state. The tax was based on the number of stores in the chain, regardless of the number doing business in Louisiana. The Great Atlantic & Pacific Tea Co. operated 15,082 stores. 106 were in Louisiana when the act went into effect. The company filed a bill in the District Court to restrain the State from enforcing the statute. The bill was dismissed and appeal taken.]

MR. JUSTICE ROBERTS delivered the opinion of the Court.

This case presents the questions whether the method prescribed by a chain store tax act for ascertaining the rate of taxation offends the Fourteenth Amendment and the commerce clause of the Federal Constitution. . . .

First. The exaction is an occupation or license tax. The subject is the conduct of a business within Louisiana. Without contravening the equal protection clause of the Fourteenth Amendment a state may separately classify for taxation the conduct of a chain store, and may increase the rate in proportion to the increase in the number of stores within the state, since the opportunities and powers of a chain store operator become greater with the growth of the number of units maintained. The appellants assert that in adjusting the rate for a chain store in Louisiana the legislature may not take into account the size of the chain to which the store belongs, by counting the total number of its units wherever located. So to do, it is claimed, is arbitrarily to discriminate against sectional or national chains in favor of intrastate chains. . . .

If the competitive advantages of a chain increase with the number of its component links, it is hard to see how these advantages cease at the state boundary. Under the findings a store belonging to a chain of one hundred, all located in Louisiana, has not the same competitive advantages as one of one hundred belonging to a national chain of one thousand. . . .

The court's findings are supported by evidence bearing upon a variety of advantages enjoyed by large chains which are unavailable to smaller chains. . . .

.... Whatever the pertinence of the reply, the facts found respect-

ing the advantages of a larger chain as compared with a smaller justify as not unreasonable or arbitrary the imposition of a higher license tax on the units of the former which are maintained within the state. Even one unit of such a national chain located in Louisiana enjoys competitive advantages over the stores of the local proprietor consequent upon its relation to the far-flung activities and facilities of the chain.

The act under review is to be distinguished from the Florida statute considered in *Liggett Co. v. Lee* (288 U.S. 517), which increased the tax if the chain happened to have stores in two counties of the state rather than in one. The increase of rate was held arbitrary because it was unrelated to the size or character of the chain and was conditioned solely upon the location of one or more of its units. . . .

Second. The appellants contend that the Act deprives them of property without due process of law because the tax is imposed, at least in part, upon things which are beyond the jurisdiction of Louisiana. The state may not tax real property or tangible personal property lying outside her borders; nor may she lay an excise or privilege tax upon the exercise or enjoyment of a right or privilege in another state derived from the laws of that state and therein exercised and enjoyed. But, as we have seen, the subject of the tax in question is the prosecution of a defined business activity within the State of Louisiana,—the conduct of a retail store which is a part of a chain under a single management, ownership or control,—a legitimate subject of a license or occupation tax. The measure of the exaction is the number of units of the chain within the state,—a measure sanctioned by our decisions. The rate of tax for each such unit is fixed by reference to the size of the entire chain. In legal contemplation the state does not lay a tax upon property lying beyond her borders nor does she tax any privilege exercised and enjoyed by the taxpayer in other states. The law rates the privilege enjoyed in Louisiana according to the nature and extent of that privilege in the light of the advantages, the capacity, and the competitive ability of the chain's stores in Louisiana considered not by themselves, as if they constituted the whole organization, but in their setting as integral parts of a much larger organization. . . .

Our decision need not, however, rest on conceptions of subject, measure and rate of tax. Much broader considerations touching the state's internal policy of police sustain the exaction. The tax is laid solely upon intrastate commerce. In the exercise of its police power the state may forbid, as inimical to the public welfare, the prosecution of a particular type of business, or regulate a business in such manner as to abate evils deemed to arise from its pursuit. Whatever a state may forbid or regulate it may permit upon condition that a fee be paid in return for the privilege, and such a fee may be exacted to

discourage the prosecution of a business or to adjust competitive or economic inequalities. Taxation may be made the implement of the exercise of the state's police power; and proper and reasonable discrimination between classes to promote fair competitive conditions and to equalize economic advantages is therefore lawful.

If, in the interest of the people of the state, the legislature deemed it necessary either to mitigate evils of competition as between single stores and chains or to neutralize disadvantages of small chains in their competition with larger ones, or to discourage merchandising within the state by chains grown so large as to become a menace to the general welfare, it was at liberty to regulate the matter directly or to resort to the type of taxation evidenced by the Act of 1934 as a means of regulation. . . . The policy Louisiana is free to adopt with respect to the business activities of her own citizens she may apply to the citizens of other states who conduct the same business within her borders, and this irrespective of whether the evils requiring regulation arise solely from operations in Louisiana or are in part the result of extra-state transactions. . . .

MR. JUSTICE VAN DEVANTER and MR. JUSTICE STONE took no part in the consideration or decision of this case.

MR. JUSTICE SUTHERLAND, dissenting.

MR. JUSTICE McREYNOLDS, MR. JUSTICE BUTLER and I are of the opinion that the statute here involved is invalid. . . .

In *Tax Commissioners v. Jackson*, 283 U.S. 527, this court sustained the validity of an Indiana statute imposing a chain-store tax graduated according to the number of stores under the same general management.⁵ But there, the amount of the tax in respect of each store was graduated according to the whole number of stores *within the State*. Here, the amount of the tax is not limited by the number of stores operated within the state, but is increased by including stores operated in other states and foreign countries. . . .

We thought the classification in the *Jackson* case . . . was so arbitrary as to render the tax invalid under the equal protection clause of the Fourteenth Amendment, and, together with MR. JUSTICE VAN DEVANTER . . . set forth our views at length in a dissenting opinion. . . . We thought then that the *Jackson* case was wrongly decided, but, accepting it as authoritative, it seems to us certain that it goes to the extreme verge of the law, and . . . equally certain that the present decision goes far beyond the verge. We add a few words in a support of that view.

⁵ The leading case on taxation of chain stores.—Ed.

The Indiana law effected a discrimination between two classes—namely, operators of chain stores and operators of independent stores within the boundaries of the state, without reference to any stores outside. The Louisiana law effects a discrimination between two members of the same class—namely, chain-store operators within the state, where the only difference between them is that one also operates stores in other states and in Canada, while the other does not. Thus, for illustration, if A operates eleven stores in Louisiana, doing a business of \$10,000,000 per year, and has none outside, he pays \$15 for each store, or a total of \$165, while if B operates eleven stores in Louisiana, and happens to have 490 stores distributed among the remaining 47 states of the Union and foreign countries, doing a total business of \$5,000,000 per year, he is compelled to pay \$550 upon each of his eleven stores, or a total of \$6,050—36 times the amount of the tax paid by A. This enormous difference is based upon a state of affairs wholly external to the State of Louisiana, the effect of which upon the Louisiana business is a matter of bald conjecture. . . .

Moreover, if the Louisiana statute be valid, other states in the Union may pass similar acts; and it is not improbable that they will. And if they do so, a remarkable situation will be brought about. Let us suppose, for example, that ten additional states, ranging from Maine to California, adopt the Louisiana form of legislation. In each of the states, including Louisiana, a given operator has ten stores, making 110 in all. In that case he will pay in each state a tax based not upon the operation of ten stores, but on the operation of 110. Instead, therefore, of paying in each state \$100 upon the basis of \$10 for each of the ten stores, he will pay \$500 upon the basis of \$50 for each of the ten stores. If he should then put into operation sixteen additional stores, let us say in Canada or Norway, he would immediately bring himself into the bracket where the tax upon each store is fixed at \$100—thus increasing his total taxation in the eleven states from \$5,500 to \$11,000, in virtue of these comparatively small operations in a foreign country, the effect of which, if any, in respect of competitive advantages in any one of the eleven states could hardly be described otherwise than as purely speculative.

The exaction here involved is not a tax upon Louisiana property or business, but is essentially a penalty imposed upon an operator of business wholly beyond the reach of the law of that state. . . . The foregoing illustrations . . . in our opinion expose the arbitrary character of the classification. . . .

The sole fact that a Louisiana operator has opened additional stores in other states or in Canada or Norway, affords, we think, no valid basis for imposing upon him an enormously increased tax from which his competitors, similarly circumstanced in all other respects, are exempt.

The claim that thereby the balance of competitive advantage has been disturbed, is so fanciful as to furnish no basis for such legislation grounded in any policy or object of state taxation. . . . An attempt to fix the extent of the competitive advantage which will inure in favor of a business in Louisiana or the value of the privilege of operating it upon a basis so shifting and uncertain, seems to us an utterly futile undertaking. It is nothing more than an effort to reach a conclusion upon an assumed major premise, where the minor premise is unknown. . . .

INGELS v. MORF

Supreme Court of the United States. 1937.
300 U.S. 290.

MR. JUSTICE STONE delivered the opinion of the Court.

This suit was brought by appellee in the District Court for Southern California . . . to restrain appellants, state officers, from enforcing the provisions of the "Caravan" Act. . . as a forbidden burden on interstate commerce. . . . From a decree granting the relief prayed, the case comes here on appeal. . . .

The challenged statute defines "caravaning" as the transportation, "from without the state, of any motor vehicle operated on its own wheels or in tow of another vehicle for the purpose of selling or offering the same for sale . . . to any purchaser" located within or without the state. Sections 2 and 3 prohibit caravaning without attaching to each vehicle so transported a special permit issued by the State Motor Vehicle Department, for which a fee of \$15 is exacted. A permit is valid only for the trip or trips specified in it, and for a period of ninety days. . . . Section 6 directs that the fees collected be paid into the general fund in the state treasury, and declares that they are "intended to reimburse the State [*sic*] treasury for the added expense which the State may incur in the administration and enforcement of this Act, and the added expense of policing the highways over which such caravaning may be conducted, so as to provide for the safety of traffic on such highways where caravaning is being conducted."

Appellee, a resident of Los Angeles, California, carries on his business there as a dealer in automobiles. He purchases used automobiles in other states and transports them from the place of purchase to points on the California boundary line, thence over state highways to Los Angeles, and sometimes to other places, where he offers them for sale. He conducts from 20 to 25% of the total movement in such traffic.

Some of his vehicles are coupled together in twos, and move in caravans or fleets, sometimes aggregating more than thirty cars. He gave testimony, which appellants sharply challenge, that from 30 to 40% move singly and not in company with any other vehicle. A permit is required for each car, whether it moves alone or as part of a fleet. The district court found that such movement of vehicles in caravans of more than four create special traffic difficulties, but that the movement of four or less "constitutes no police problem"; that there is considerable like traffic carried on wholly within the state, for which the fee of \$15 is not exacted and for which no similar or other fee is required; and that the demanded fee for each car moving in the interstate traffic is excessive and bears no reasonable relation to the increased cost of policing. It concluded, as the appellee contends here, that the statute denies to appellee due process and equal protection, and places a forbidden burden on, and discriminates against, interstate commerce.

We find it necessary to consider only the contention that the licensing provisions burden interstate commerce. We do not discuss appellants' suggestion that, contrary to the finding below, there is no evidence of comparable traffic moving intrastate, and hence no discrimination against interstate commerce by the failure of the Act to exact a fee of those engaged in intrastate commerce. It is not denied that the permit fee, imposed upon those engaged in interstate commerce, burdens this commerce, but appellants urge that it is a permissible charge for the use of the state highways and for the cost of policing the traffic, including the cost of administering the Act.

In *Morf v. Bingaman*, 298 U.S. 407, recently before this Court, the Caravaning Act of New Mexico, containing some features similar to the present act, was likewise assailed as burdening interstate commerce by the imposition of a fee, of \$7.50 for each vehicle moving by its own power, and \$5.00 for each vehicle towed by another when moving in caravan. The statute made the privilege of using the highway conditional upon payment of the fee. The fees collected were devoted in part to highway purposes. We held that the fees were a charge for the use of the highways, not shown by the taxpayer to be unreasonable, which the state might lawfully demand. . . .

To justify the exaction by a state of a money payment burdening interstate commerce, it must affirmatively appear that it is demanded as a reimbursement for the expense of providing facilities, or of enforcing regulations of the commerce which are within its constitutional power. . . . This may appear from the statute itself . . . or from the use of the money collected, to defray such expense. . . .

Here appellant does not show that the fees collected are used to meet the cost of the construction or maintenance of its highways.

Section 6 of the challenged act, which directs that the permit fees be paid into the general fund of the state treasury, is to be contrasted with other California statutes relating to motor vehicles, which exact license fees and taxes and direct that they be paid, at least in part, into special funds devoted to highway purposes. . . . Appellants point to no statute appropriating any part of the general fund of the state treasury for highway purposes, and the Street and Highways Code . . . provides "With the exception of money authorized by law to be deposited in the state highway general fund, all money available for the acquisition of real property or interest therein for state highways or for construction, maintenance or improvement of state highways, or highways in state parks, shall be deposited in the state highway fund."

Hence we must look to the statute itself to ascertain the purposes for which the permit fees are collected. On this point it is explicit. It declares (§ 6) that they are intended to reimburse the state treasury for the added expense of administering the Caravan Act and policing the caravanning traffic. This negatives any inference of the purpose of the collection which might otherwise be drawn from the statute, and from its provision that the permit is prerequisite to the use of the highways. . . . It is true that this declaration is not an appropriation of the moneys collected and it does not foreclose the use of the fund for highway maintenance, should the state elect to do so. But until such appropriation is made the statute itself states the legislative purpose, and precludes state officials from asserting that the fees are collected for any other.

The burden rests on appellee to show that the fee is excessive for the declared purpose. . . . But the trial court has found that it is excessive and the finding is amply supported by evidence. In 1934, 9,663 cars were caravanned, and in the first eleven months of 1935, 14,000. This supports the inference of the trial court that 15,000 cars are brought into the state, annually, for sale under the conditions defined in the Act. There was testimony that the expense involved in issuing caravanning permits is "about \$5 per car," although it appeared that the permit fee for local pleasure cars, numbering 1,960,000, was \$3.00 per year of which only 35% (\$1.05) is devoted to administrative expenses.

The Caravan Act became effective September 15, 1935. A permit granted under it is confined to a limited movement from the state boundary to the immediate point of destination. The undisputed evidence shows that prior to the passage of the measure two new district inspectors were appointed solely on account of caravanning, and fourteen new highway patrolmen were "assigned," particularly because of caravanning and its effect on traffic. The chief of the California highway patrol, in summarizing his testimony, said that he had put on "approxi-

mately six additional men over the whole state because there were caravans on the road, and I anticipate putting on more men." They receive a monthly salary of \$170, which may eventually be increased to \$225. The district court found that the evidence indicated that a total of ten men at a salary of \$200 a month, and at an aggregate cost of \$24,000 a year, would be adequate to police the traffic, whereas the permit fees from 15,000 cars would yield an annual return of \$225,000.

We cannot say that the evidence does not support the conclusion of the trial court that the cost of policing would be amply met by a license fee of one-third of the amount so charged. . . . It rightly held that the licensing provisions of the statute impose an unconstitutional burden on interstate commerce. . . .

The Privilege Tax

WESTERN LIVE STOCK *v.* BUREAU OF REVENUE

Supreme Court of the United States. 1938.
303 U.S. 250.

MR. JUSTICE STONE delivered the opinion of the Court.

Section 207, c. 7, of the New Mexico Special Session Laws of 1934, levies a privilege tax upon the gross receipts of those engaged in certain specified businesses. . . .

Appellants publish a monthly livestock trade journal which they wholly prepare, edit, and publish within the state of New Mexico, where their only office and place of business is located. The journal has a circulation in New Mexico and other states, being distributed to paid subscribers. . . . It carries advertisements, some of which are obtained from advertisers in other states through appellants' solicitations there. Where such contracts are entered into, payment is made by remittances to appellants sent interstate; and the contracts contemplate and provide for the interstate shipment by the advertisers to appellants of advertising cuts, mats, information and copy. . . .

Appellants insist here, as they did in the state courts, that the sums earned under the advertising contracts are immune from the tax because the contracts are entered into by transactions across state lines and result in the like transmission of advertising materials by advertisers to appellants, and also because performance involves the mailing or other distribution of appellants' magazines to points without the state.

That the mere formation of a contract between persons in different

states is not within the protection of the commerce clause, at least in the absence of Congressional action, unless the performance is within its protection, is a proposition no longer open to question. *Paul v. Virginia*, 8 Wall. 168. . . .

We turn to the other and more vexed question, whether the tax is invalid because the performance of the contract, for which the compensation is paid, involves to some extent the distribution, interstate, of some copies of the magazine containing the advertisements. . . .

It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing the business. "Even interstate business must pay its way," . . . *Galveston, H. & S. A. Ry. Co. v. Texas*, 210 U.S. 217, 225, 227, and the bare fact that one is carrying on interstate commerce does not relieve him from many forms of state taxation which add to the cost of his business. He is subject to a property tax on the instruments employed in the commerce . . . *Adams Express Co. v. Ohio State Auditor*, 165 U.S. 194 . . . , and if the property devoted to interstate transportation is used both within and without the state a tax fairly apportioned to its use within the state will be sustained. *Pullman's Palace Car Co. v. Pennsylvania*, 141 U.S. 18. . . . Net earnings from interstate commerce are subject to income tax, *United States Glue Co. v. Oak Creek*, 247 U.S. 321, and if the commerce is carried on by a corporation a franchise tax may be imposed, measured by the net income from business done within the state, including such portions of the income derived from interstate commerce as may be justly attributable to business done within the state by a fair method of apportionment. *Underwood Typewriter Co. v. Chamberlain*, 254 U.S. 113. . . .

All of these taxes in one way or another add to the expense of carrying on interstate commerce, and in that sense burden it; but they are not for that reason prohibited. On the other hand, local taxes, measured by gross receipts from interstate commerce, have often been pronounced unconstitutional. The vice characteristic of those which have been held invalid is that they have placed on the commerce burdens of such a nature as to be capable, in point of substance, of being imposed . . . or added to . . . with equal right by every state which the commerce touches, merely because interstate commerce is being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce. See . . . *Case of State Freight Tax*, 15 Wall. 232, 280. . . . The multitude of state taxes measured by the gross receipts from interstate transactions would spell the destruction of interstate commerce and renew the barriers to interstate trade which it was the object of the commerce clause to remove. *Baldwin v. G. A. F. Seelig, Inc.*, 294 U.S. 511, 523.

It is for these reasons that a state may not lay a tax measured by the amount of merchandise carried in interstate commerce, *Case of State Freight Tax, supra*, or upon the freight earned by its carriage *Philadelphia & Sou. S. S. Co. v. Pennsylvania* [122 U.S. 326,] restricting the effect of *State Tax on Railway Gross Receipts*, 15 Wall. 284, with which compare Miller, J., dissenting in that case at p. 297 [and Bradley, J., dissenting in *Maine v. Grand Trunk Ry. Co.* 142 U.S. 217, 235]. Taxation measured by gross receipts from interstate commerce has been sustained when fairly apportioned to the commerce carried on within the taxing state, *United States Express Co. v. Minnesota*, 223 U.S. 335, and in other cases has been rejected only because the apportionment was found to be inadequate or unfair. Whether the tax was sustained as a fair means of measuring a local privilege or franchise, or as a method of arriving at the fair measure of a tax substituted for local property taxes, it is a practical way of laying upon the commerce its share of the local tax burden without subjecting it to multiple taxation not borne by local commerce and to which it would be subject if gross receipts, unapportioned, could be made the measure of a tax laid in every state where the commerce is carried on.

In the present case the tax is, in form and substance, an excise conditioned on the carrying on of a local business, that of providing and selling advertising space in a published journal, which is sold to and paid for by subscribers, some of whom receive it in interstate commerce. The price at which the advertising is sold is made the measure of the tax. This Court has sustained a similar tax said to be on the privilege of manufacturing, measured by the total gross receipts from sales of the manufactured goods both intrastate and interstate. *American Manufacturing Co. v. St. Louis* [250 U.S. 459], 462. The actual sales prices which measured the tax were taken to be no more than the measure of the value of the goods manufactured, and so an appropriate measure of the value of the privilege, the taxation of which was deferred until the goods were sold. *Ficklen v. Shelby County Taxing Dist.* [145 U.S. 1], sustained a license tax measured by a percentage of the gross annual commissions received by brokers engaged in negotiating sales within for sellers without the state.

Viewed only as authority, *American Manufacturing Co. v. St. Louis, supra*, would seem decisive of the present case. But we think the tax assailed here finds support in reason, and in the practical needs of a taxing system which, under constitutional limitations, must accommodate itself to the double demand that interstate business shall pay its way, and that at the same time it shall not be burdened with cumulative exactions which are not similarly laid on local business.

As we have said, the carrying on of a local business may be made the condition of state taxation, if it is distinct from interstate commerce, and the business of preparing, printing and publishing magazine advertising is peculiarly local and distinct from its circulation whether or not that circulation be interstate commerce. . . . No one would doubt that the tax on the privilege would be valid if it were measured by the amount of advertising space sold. . . . Selling price, taken as a measure of value whose accuracy appellants do not challenge, is for all practical purposes a convenient means of arriving at an equitable measure of the burden which may be imposed on an admittedly taxable subject matter. . . . So far as the advertising rates reflect a value attributable to the maintenance of a circulation of the magazine interstate, we think the burden on the interstate business is too remote and too attenuated to call for a rigidly logical application of the doctrine that gross receipts from interstate commerce may not be made the measure of a tax. . . . Practical rather than logical distinctions must be sought. . . .

Here it is perhaps enough that the privilege taxed is of a type which has been regarded as so separate and distinct from interstate transportation as to admit of different treatment for purposes of taxation, *Utah Light & Power Co. v. Pfof* [286 U.S. 165] The tax is not invalid because the value is enhanced by appellant's circulation of their journal any more than property taxes on railroads are invalid because property value is increased by the circumstance that the railroads do an interstate business.

But there is an added reason why we think the tax is not subject to the objection which has been leveled at taxes laid upon gross receipts derived from interstate communication or transportation of goods. So far as the value contributed to appellants' New Mexico business by circulation of the magazine interstate is taxed, it cannot again be taxed elsewhere any more than the value of railroad property taxed locally. The tax is not one which in form or substance can be repeated by other states in such manner as to lay an added burden on the interstate distribution of the magazine. . . . All the events upon which the tax is conditioned—the preparation, printing and publication of the advertising matter, and the receipt of the sums paid for it—occur in New Mexico and not elsewhere. All are beyond any control and taxing power which, without the commerce clause, those states could exert through their dominion over the distribution of the magazine or its subscribers. The dangers which may ensue from the imposition of a tax measured by gross receipts derived directly from interstate commerce are absent. . . . In none of these respects is the present tax objectionable.

MR. JUSTICE McREYNOLDS and MR. JUSTICE BUTLER are of opinion that the judgment should be reversed.

MR. JUSTICE CARDOZO took no part in the consideration or decision of this case.

WISCONSIN *v.* J. C. PENNEY CO.

Supreme Court of the United States. 1940.

311 U.S. 435.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

Whether the tax imposed by § 3 of Chapter 505 of the Wisconsin Laws of 1935 may apply to a foreign corporation licensed to do business in Wisconsin without offending the Fourteenth Amendment of the Constitution is the question before us. . . .

For many years, corporations chartered by other states but permitted to carry on business in Wisconsin have been subject to a general corporate income tax act on earnings attributable to their Wisconsin activities. The state has, of course, power to impose such a tax. . . . "For the privilege of declaring and receiving dividends, out of income derived from property located and business transacted in" Wisconsin, an exaction "equal to two and one-half per centum of the amount of such dividends declared and paid by all corporations (foreign and local)" is the additional tax now before us. . . . The practical operation of this legislation is to impose an additional tax on corporate earnings within Wisconsin but to postpone the liability for this tax until such earnings are paid out in dividends. In a word, by its general income tax Wisconsin taxes corporate income that is taken in; by the Privilege Dividend Tax of 1935 Wisconsin superimposed upon this income tax a tax on corporate income that is paid out.

As pressures for new revenues become more and more insistent, ways and means of meeting them present to a state not only the baffling task of tapping fresh sources of revenue but of doing so with due regard to a state's existing taxing system. The tax now assailed gains nourishing significance when placed in the context of the Wisconsin taxing system of which it became a part. Wisconsin relied heavily upon taxation of incomes and largely looked to this source to meet the increasing demands of the depression years. But a special Wisconsin feature was exemption of dividends from personal taxation. . . . Attempts at relief from the unfairness charged against this exemption of dividends, particularly advantageous to the higher brackets, were steadily pressed before the Wisconsin Legislature. To relieve local earnings of foreign corporations from a dividend tax would have had a depressive effect on wholly local enterprises. The Privileged Dividend Tax was devised to reduce

at least in part the state's revenue losses due to dividend exemptions, and also to equalize the burden on all Wisconsin earnings, regardless of the formal home of the corporation. . . .

A tax is an exaction. Ascertainment of the scope of the exaction—what is included in it—is for the state court. But the descriptive pigeon-hole into which a state court puts a tax is of no moment in determining the constitutional significance of the exaction. . . . Such has been the repeated import of the cases which only recently were well summarized by the guiding formulation for adjudicating a tax measure, that “in passing on its constitutionality we are concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it.” *Lawrence v. State Tax Commission*, 286 U.S. 276, 280.

The Constitution is not a formulary. It does not demand of states strict observance of rigid categories nor precision of technical phrasing in their exercise of the most basic power of government, that of taxation. For constitutional purposes the decisive issue turns on the operating incidence of a challenged tax. A state is free to pursue its own fiscal policies, unembarrassed by the Constitution, if by the practical operation of a tax the state has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society.

Constitutional provisions are so often glossed over with commentary that imperceptibly we tend to construe the commentary rather than the text. We cannot, however, be too often reminded that the limits on the otherwise autonomous powers of the states are those in the Constitution and not verbal weapons imported into it. “Taxable event,” “jurisdiction to tax,” “business situs,” “extra territoriality,” are all compendious ways of implying the impotence of state power because state power has nothing on which to operate. These tags are not instruments of adjudication but statements of result in applying the sole constitutional test for a case like the present one. That test is whether property was taken without due process of law, or, if paraphrase we must, whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return. The substantial privilege of carrying on business in Wisconsin, which has here been given, clearly supports the tax, and the state has not given the less merely because it has conditioned the demand of the exaction upon happenings outside its own borders. The fact that a tax is contingent upon events brought to pass without a state does not destroy the nexus between such a tax and transactions within a state for which the tax is an exaction. . . .

MR. JUSTICE ROBERTS.

I assume that the principle still holds good that a state cannot extend her sovereignty by legislation so as to prohibit, to regulate, or to tax property or transactions of citizens of other sovereign states lying outside her boundaries and regulated by the law of the state of domicile or residence. . . . Those activities which have a real and substantial relation to the business transacted by the citizen of another state within her confines are, of course, subject to regulation and to taxation. . . .

The respondent admittedly receives income in Wisconsin. No one questions the power of Wisconsin to lay a tax upon the receipt of that income. It has done so. It is said that the challenged exaction is merely an additional income tax—this, notwithstanding that the tax is not called an income tax, has been held by the highest court of Wisconsin not to be an income tax but an excise upon a privilege,—in the view that in testing the constitutionality of an exaction this court examines for itself the nature and incidence of the tax and disregards mere names and descriptive epithets. With that principle I have no quarrel, but I think the opinion of the court demonstrates that the tax here in question is, and can be, sustained only by a disregard of it. . . .

The facts are not in dispute. The respondent receives income in many states. That income is forwarded to its home office after bearing whatever tax is laid upon its receipt in the state of receipt. Thereupon the funds so forwarded become a portion of the general mass of the respondent's property, held and administered at its general office. . . . Their management and their disbursement have no relation to the original receipt of income save only the fact that, like most property, they are built up as the fruits of income. Their use and their disbursement does not depend on any law of Wisconsin and cannot be controlled by any such law. . . .

Under the challenged statute, a presumption is created which is shown in the case of the assessment against the respondent for the years in question to be contrary to the fact,—namely, that an arbitrarily assumed proportion of the dividend is paid out of the respondent's earnings in Wisconsin for the year immediately preceding the payment of such dividend. By the very terms of the Act, the tax is laid not on the corporation but on the stockholder receiving the dividend and, by confession, thousands of such stockholders are not residents of Wisconsin. The corporation is the mere collector of the tax and the penalty for failure to collect it is that the corporation must pay it. If the exaction is an income tax in any sense it is such upon the stockholder and is obviously bad. It cannot, except by a perversion of the term and

the affixing of an arbitrary label, be denominated a tax upon the income of the respondent. . . .

THE CHIEF JUSTICE, MR. JUSTICE McREYNOLDS and MR. JUSTICE REED concur in this opinion.

The Income Tax

MATSON NAVIGATION CO. *v.* STATE BOARD OF EQUALIZATION OF CALIFORNIA, 297 U.S. 441 (1936).

MR. JUSTICE BUTLER delivered the opinion of the Court.

The California Bank and Franchise Tax Act declares: Every business corporation, with exceptions not here material, "shall annually pay to the state, for the privilege of exercising its corporate franchises within this state, a tax according to or measured by its net income" to be computed at the rate of four per cent. upon that income for the preceding year. . . . If all the corporation's business is done in California, the tax shall be computed on its entire net income; if not, on that portion which is derived from business done within the State. . . .

Appellants were incorporated under the laws of California. . . . Matson Navigation Company and the Oceanic Steamship Company, in addition to doing substantial intrastate business in California, were engaged in transportation between ports on the Pacific coast in the United States and ports in Hawaii, the South Sea Islands, Australia and New Zealand. . . . In March, 1931, appellants made a consolidated return showing for 1930 net income from intrastate business of \$730,357.81 and from interstate and foreign business of \$2,526,148.22. They maintained that the tax should not be more than four per cent. of their net income from intrastate business. But the tax commissioner held that there should be included in the computation the part of their net income from interstate and foreign commerce that was attributable to California, found to be 22.2% (*sic*), and on that basis he assessed an additional tax. The state board of equalization sustained the additional assessment. The case was taken on writ of review to the state supreme court and there, contrary to appellants' contentions, it was held that the act as construed by the tax commissioner is not repugnant to the commerce clause of the federal Constitution or to the due process or equal protection clause of the Fourteenth Amendment. . . .

The only question here is whether consistently with these constitutional provisions there may be included in the base, to which the rate

of four per cent. was applied, any part of net income derived from appellants' interstate and foreign commerce.

1. Does the tax burden interstate commerce? There is no controversy as to the amount, if any, that may be apportioned to California for the purpose of computing the tax. . . . Appellants' franchises, including the right to be corporations empowered to do business in corporate form in accordance with California law, were granted to them by the State, and undoubtedly the State may tax the privilege of exercising the franchises. *St. Louis S. W. Ry. v. Arkansas*, 235 U.S. 350, 366-367. *Detroit Bridge Co. v. Tax Board*, 287 U.S. 295. *Anglo-Chilean Nitrate Corp. v. Alabama*, 288 U.S. 218, 224. Unquestionably annual profits, gains or net income derived from business done within the State is an indication sufficiently significant to be deemed a reasonable base on which to compute the value of that use. Cf. *Air-Way Corp. v. Day*, 266 U.S. 71, 83. Our decisions demonstrate that a state tax on gross earnings derived from interstate commerce is a burden upon that commerce and repugnant to the commerce clause. *Philadelphia & Southern S. S. Co. v. Pennsylvania*, 122 U.S. 326. *Galveston, H. & S. A. Ry. Co. v. Texas*, 210 U.S. 217. *Meyer v. Wells, Fargo & Co.*, 223 U.S. 298, 300. *New Jersey Telephone Co. v. Tax Board*, 280 U.S. 338, 346. Cf. *Pullman Co. v. Richardson*, 261 U.S. 330, 338. They also definitely show that a State may tax net income derived from a domestic corporation's business—intrastate, interstate and foreign. *U. S. Glue Co. v. Oak Creek*, 247 U. S. 321, 328. *Shaffer v. Carter*, 252 U. S. 37, 57. *Atlantic Coast Line v. Daughton*, 262 U.S. 413, 420, 422. Cf. *Peck & Co. v. Lowe*, 247 U.S. 165. *National Paper Co. v. Bowers*, 266 U.S. 373, 377. And net income justly attributable to all classes of business done within the State may be used as the measure of a tax imposed to pay the State for the use therein of the corporate franchises granted by it. *Bass, Ratcliff & Gretton, Ltd., v. Tax Commission*, 266 U.S. 271, 277. *Underwood Typewriter Co. v. Chamberlain*, 254 U.S. 113, 120. Cf. *Hans Rees' Sons v. North Carolina*, 283 U.S. 123, 129 *et seq.* The Act as construed below does not violate the commerce clause.

2. Appellants suggest that the additional tax has no relation to the privilege of exercising their corporate franchises and that the State, by enforcing it, would deprive them of property without due process of law. They rely on *Hans Rees' Sons v. North Carolina*, *supra*. We there held that a method of allocating, for taxation, to a State that part of the income of a foreign corporation which bears the same ratio to its entire net income as the value of its tangible property within the State bears to the value of all its tangible property, works an unconstitutional result if the part of the income thus attributed to the State is out of all appropriate proportion to the business there transacted by the

corporation. There is nothing in that decision to support appellants' contention. In that case the question was as to apportionment of income to the taxing State. The controversy now before us concerns the amount to be paid for the privilege of using in California corporate franchises granted by that State to appellants. No question of apportionment is here involved. The tax commissioner's determination, 22.2%, was not disturbed by the board of equalization or the supreme court and appellants do not in this court challenge the use of that ratio. As above shown, net income from appellants' intrastate, interstate and foreign business attributable to California may be taken into account in computing the tax. As the taxing jurisdiction of California extends to that income, the use thereof to compute the tax may not be said to be arbitrary, capricious or in violation of the due process clause of the Fourteenth Amendment.

3. . . . The differences portrayed in the argument of appellants do not deny them equal protection of the laws. The measure of the tax is the total net income attributable to California; it does not depend upon the net derived from business wholly within or that partly within and partly without the State. . . . The basis of the classification is not the kind of business—whether intrastate or otherwise—from which the income is derived; it is the exclusion of all income attributable to business done outside the State. The measure of the exaction does not lack uniformity because of differences in the amounts of net incomes attributable to California. Appellants' contention is not supported by the fact that there are or may be substantial differences between amounts and sources of net incomes of corporation subject to the tax. The rate is uniform; no discrimination results from its application.

. . . . A foreign corporation whose sole business in California is interstate and foreign commerce cannot be subjected to the tax in question. *Alpha Cement Co. v. Massachusetts*, 268 U.S. 203, 216 *et seq.* *Anglo-Chilean Nitrate Corp. v. Alabama*, *supra*. . . .

INTERNATIONAL HARVESTER CO. *v.* DEPARTMENT OF TREASURY.

Supreme Court of the United States. 1944.

322 U.S. 340.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Appellants are corporations authorized to do business in Indiana but incorporated under the laws of other States. They manufacture farm implements and motor trucks and sell those articles both at wholesale and retail. During the period here in question they maintained manufac-

turing plants at Richmond and Fort Wayne, Indiana, and selling branches at Indianapolis, Terre Haute, Fort Wayne, and Evansville, Indiana. They also had manufacturing plants and sales branches in adjoining States and elsewhere. Each branch had an assigned territory. In some instances parts of Indiana were within the exclusive jurisdiction of branch offices which were located outside the State. The transactions which Indiana says may be taxed without infringement of the federal Constitution are described by the Indiana Supreme Court as follows:

Class C: Sales by branches located outside Indiana to dealers and users residing in Indiana. The orders were solicited in Indiana and the customers took delivery to themselves at the factories in Indiana to save time and expense of shipping.

Class D: Sales by branches located in Indiana to dealers and users residing outside of Indiana, in which the customers came to Indiana and accepted delivery to themselves in this State.

Class E: Sales by branches located in Indiana to dealers and users residing in Indiana, in which the goods were shipped from points outside Indiana to customers in Indiana, pursuant to contracts so providing.

The gross income tax collected on those transactions is the same one which was before this Court in *Department of Treasury v. Wood Preserving Corp.*, 313 U.S. 62, and *Adams Mfg. Co. v. Storen*, 304 U.S. 307. The tax was described in the *Storen* case as "a privilege tax upon the receipt of gross income." 304 U.S. p. 311. In that case an Indiana corporation which manufactured products and maintained its home office, principal place of business, and factory in Indiana sold those products to customers in other States and foreign countries upon orders taken subject to approval at the home office. It was held that the Commerce Clause (Art. I, sec. 8 of the Constitution) was a barrier to the imposition of the tax on the gross receipts from such sales. But as we held in the *Wood Preserving Corp.* case, neither the Commerce Clause nor the Fourteenth Amendment prevents the imposition of the tax on receipts from an intrastate transaction even though the total activities from which the local transaction derives may have incidental interstate attributes.

The objections under the Commerce Clause and the Fourteenth Amendment to the tax on the receipts from the three classes of sales involved here are equally without merit.

In the *Wood Preserving Corp.* case contracts were made outside Indiana for the sale of railroad ties. The respondent-seller, a Delaware corporation with its principal place of business in Pennsylvania, obtained the ties from producers in Indiana and delivered them to the buyer (Baltimore & Ohio Railroad Co.) in Indiana who immediately loaded them on cars and shipped them out of the State. Payments for the ties were made to the seller in Pennsylvania. We held that Indiana did not

exceed its constitutional authority when it laid the tax on the receipts from those sales.

We see no difference between the sales in the *Wood Preserving Corp.* case and the Class C sales in the present one which is translatable into a difference in Indiana's power to tax. The fact that the sales in Class C are made by an out-of-state seller and that the contracts were made outside the State is not controlling. Here as in the *Wood Preserving Corp.* case, delivery of the goods in Indiana is an adequate taxable event. When Indiana lays hold of that transaction and levies a tax on the receipts which accrue from it, Indiana is asserting authority over the fruits of a transaction consummated within its borders. These sales, moreover, are sales of Indiana goods to Indiana purchasers. While the contracts were made outside the State, the goods were neither just completing nor just starting an interstate journey. It could hardly be maintained that Indiana could not impose a sales tax or a use tax on these transactions. But, as we shall see, if that is the case, there is no constitutional objection to the imposition of a gross receipts tax by the State of the buyer.

The Class D sales are sales by an Indiana seller of Indiana goods to an out-of-state buyer who comes to Indiana, takes delivery there and transports the goods to another State. The *Wood Preserving Corp.* case indicates that it is immaterial to the present issue that the goods are to be transported out of Indiana immediately on delivery. Moreover, both the agreement to sell and the delivery took place in Indiana. In *McGoldrick v. Berwind-White Co.*, 309 U.S. 33, we had before us a question of the constitutionality of a New York City sales tax as applied to purchases from out-of-state sellers. The tax was "laid upon the buyer, for consumption, of tangible personal property, and measured by the sales price." *Id.*, p. 43. And it was "conditioned upon events occurring" within New York, i.e., the "transfer of title or possession of the purchased property." *Id.*, pp. 43-44. Under the principle of that case, a buyer who accepted delivery in New York would not be exempted from the sales tax because he came from without the State and intended to return to his home with the goods. The present tax, to be sure, is on the seller. But in each a local transaction is made the taxable event and that event is separate and distinct from the transportation or intercourse which is interstate commerce. . . .

The sales in Class E embrace those by an Indiana seller to an Indiana buyer where the goods are shipped from points outside the State to the buyer. The validity of the tax on receipts from such sales would seem to follow *a fortiori* from our recent affirmance *per curiam* (318 U.S. 740) of *Department of Treasury v. Allied Mills*, 220 Ind. 340, 42 N. E. 2d 34. In that case an Indiana corporation had one factory in Indiana and two in Illinois. Each factory was given a specified part of Indiana to service—

a method of distribution adopted to take advantage of favorable freight rates, not to evade taxes. The issue in the case was whether the Indiana gross income tax could be applied to receipts from sales to resident customers in Indiana to whom deliveries were made from the plants in Illinois pursuant to orders taken in Indiana and accepted in Illinois. The Indiana Supreme Court sustained the imposition of the tax. We affirmed that judgment on the authority of *Felt & Tarrant Co. v. Gallagher*, 306 U.S. 62, and *McGoldrick v. Felt & Tarrant Co.*, 309 U.S. 70.

In the latter cases the Felt & Tarrant Co. was an Illinois seller who had agents soliciting orders in California and New York. All orders were forwarded to the Illinois office for approval. If accepted, the orders were filled by shipping the products to the local agent who delivered to the purchaser. At times shipments would be made direct to the buyers. Remittances were made by the customers direct to the Illinois office. . . .

We do not see how these cases can stand if the Class E sales are to be exempt on constitutional grounds from the present tax. . . . It is of course true that in the *Felt & Tarrant Co.* cases taxes of different names were involved. But we are dealing in this field with matters of substance, not with dialectics. . . . In this case as in the foregoing sales tax cases the taxable transaction is at the final stage of an interstate movement and the tax is on the gross receipts from an interstate transaction. . . . There is the same practical equivalence whether the tax is on the selling or the buying phase of the transaction. . . . In the light of our recent decisions it could hardly be held that Indiana lacked constitutional authority to impose a sales tax or a use tax on these transactions. But if that is true, a constitutional difference is not apparent when a "gross receipts" tax is utilized instead. . . .

Much is said, however, of double taxation, particularly with reference to the Class D sales. . . . But it will be time to cross that bridge when we come to it. . . . We only hold that where a State seeks to tax gross receipts from interstate transactions consummated within its borders its power to do so cannot be withheld on constitutional grounds where it treats wholly local transactions the same way. . . .

MR. JUSTICE JACKSON dissents.

MR. JUSTICE ROBERTS took no part in the consideration or decision of this case.

MR. JUSTICE RUTLEDGE, concurring. . . .

*The Use Tax*FELT & TARRANT MANUFACTURING CO. *v.* GALLAGHER.Supreme Court of the United States. 1939.
306 U.S. 62.

MR. JUSTICE McREYNOLDS delivered the opinion of the Court.

Appellant seeks an injunction prohibiting the state officers from enforcing against it the California Use Tax Act of 1935. . . . Counsel do not question the right of the state to collect this tax from the user, etc., but they say that, in the circumstances here disclosed, the officers may not compel appellant to serve as an agent for collecting the tax as they are threatening to do. . . .

It appears—

Appellant, an Illinois corporation, is engaged in manufacturing and selling comptometers in that state and delivering these to purchasers in various parts of the Union. As stated by the court below its method of doing business with respect to California purchasers is substantially as follows:

"Pursuant to a separate contract made with each, the exclusive right to solicit orders in California is granted to two general agents, each of whom is allotted a separate section of the State. Under this contract the only compensation paid to a general agent consists of commissions on sales made. Each general agent may employ sub-agents and also a demonstrator for the purpose of demonstrating and instructing respecting the comptometers, provided such employment is approved by the plaintiff. Likewise, plaintiff agrees by this contract to pay the rent of an office for each general agent . . . ; also agrees to pay part of the travelling expenses incurred by each general agent . . . and also to reimburse each general agent . . . in the amount of \$40.00 per month toward the salary of a demonstrator. . . . Under this contract the general agent must devote his entire time and attention to soliciting orders for plaintiff. All orders taken must be submitted to and approved by plaintiff, all sales and deliveries must be made by, and all bills for such orders as are accepted must be rendered by, the plaintiff. The general agent is prohibited from making collections and all payments must be made directly to plaintiff. . . .

"As soon as an order is accepted a particular machine is appropriated for that purpose in plaintiff's shipping department in Illinois. All machines sold for delivery in California are shipped from one of plaintiff's

distributing points outside of the State. . . . Plaintiff has never qualified to do intrastate business in California." . . .

The argument is this—

The appellant, an Illinois corporation, carried on no intrastate operations in California and is not subject to its jurisdiction. . . . California, therefore, lacks the power to require it (1) to act as the state's collecting agent with respect to use tax which may become due from California storers, users or consumers, or (2) to insure payment of such tax if it fails to make collections from the tax debtors, or (3) otherwise to act as a "retailer" as defined by the Act and the appellees. The treatment of the appellant as a retailer subject to the provisions of the California Use Tax Act is a direct burden upon interstate commerce prohibited by the Federal Constitution. Numerous provisions of the statute, if applied, would deprive appellant of its property without due process of law.

The trial court thought that both contentions were foreclosed by what was said and ruled in *Bowman v. Continental Oil Co.*, 256 U.S. 642, 650, *Monamotor Oil Co. v. Johnson*, 292 U.S. 86, 93, 95, and *Henneford v. Silas Mason Co.*, 300 U.S. 577, 582, 583. And we agree with that conclusion.

Henneford v. Silas Mason Co. upheld a Washington statute similar to the one under consideration. The opinion declared (pp. 582, 583)—

"The tax is not upon the operations of interstate commerce, but upon the privilege of use after commerce is at an end.

"Things acquired or transported in interstate commerce may be subjected to a property tax, non-discriminatory in its operation, when they have become part of the common mass of property within the state of destination. . . . This is so, indeed, though they are still in the original packages. . . . For like reasons they may be subjected, when once they are at rest, to a nondiscriminatory tax upon use or enjoyment. . . . A tax upon the privilege of use or storage when the chattel used or stored has ceased to be in transit is now an impost so common that its validity has been withdrawn from the arena of debate."

Bowman v. Continental Oil Co. recognized the right of the state to require a distributor "to render detailed statements of all gasoline received, sold, or used by it, whether in interstate commerce or not, to the end that the State may the more readily enforce said excise tax to the extent that it has lawful power to enforce it as above stated."

Monamotor Oil Co. v. Johnson upheld an Iowa statute. The complainant there sought an injunction prohibiting tax officers from requiring the distributor of motor oil received from another state to pay into the state treasury the tax levied upon the consumer. This Court said (pp. 93, 95), "There is no substance in the claim that the statutes impose a

burden upon interstate commerce. . . . The statute in terms imposes the tax on motor vehicle fuel used or otherwise disposed of in the state. Instead of collecting the tax from the user through its own officers, the state makes the distributor its agent for that purpose. This is a common and entirely lawful arrangement. . . . That statute obviously was not intended to reach transactions in interstate commerce, but to tax the use of motor fuel after it had come to rest in Iowa, and the requirement that the appellant as the shipper into Iowa shall, as agent of the state, report and pay the tax on the gasoline thus coming into the state for use by others on whom the tax falls imposes no unconstitutional burden either upon interstate commerce or upon the appellant." . . .

MR. JUSTICE ROBERTS took no part in the consideration or decision of this cause.

GENERAL TRADING CO. doing business as MINNEAPOLIS IRON STORE v. STATE
TAX COMMISSION OF THE STATE OF IOWA.

Supreme Court of the United States. 1944.
322 U.S. 335.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

The State Tax Commission of Iowa brought this suit under the authority of the Iowa Use Tax Law which was recently here in *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359, and *Nelson v. Montgomery Ward & Co.*, 312 U.S. 373. The question now presented is, in short, whether Iowa may collect, in the circumstances of this case, such a use tax from General Trading Company, a Minnesota corporation, on the basis of property bought from Trading Company and sent by it from Minnesota to purchasers in Iowa for use and enjoyment there.

By the Iowa Use Tax Law a tax is "imposed on the use in this state of tangible personal property purchased . . . for use in this state at the rate of two per cent of the purchase price of such property. Said tax is . . . imposed upon every person using such property within this state until such tax has been paid directly to the county treasurer, to a retailer, or to the commission. . . ." The use of property the sale of which is subject to Iowa's sales tax is exempted from the use tax, . . . but the sales tax can be laid only on sales at retail within the State. . . . The use tax constitutes a debt owed by the retailer to the State. . . .

. . . (I)t appears that General Trading Company had never qualified to do business as a foreign corporation in Iowa nor does it maintain there any office, branch or warehouse. The property on which the use

tax was laid was sent to Iowa from their Minnesota headquarters. The orders were always subject to acceptance in Minnesota whence the goods were shipped into Iowa by common carriers or the post. Upon these facts and its holding that Trading Company was a "retailer maintaining a place of business in this state" within the meaning of the Iowa statute, the Iowa Supreme Court held that Iowa had not exceeded its powers in the imposition of this use tax on Iowa purchasers, and that collection could validly be made through the Trading Company.

We brought the case here to meet the claim that there was need for further precision regarding the scope of our previous rulings on the power of States to levy use taxes. In view, however, of the clear understanding by the court below that the facts we have summarized bring the transaction within the taxing power of Iowa, there is little need for elaboration. We agree with the Iowa Supreme Court that *Felt & Tarrant Co. v. Gallagher*, 306 U.S. 62; *Nelson v. Sears Roebuck & Co.*, *supra*; and *Nelson v. Montgomery Ward & Co.*, *supra*, are controlling. The *Gallagher* case is indistinguishable. . . . Of course, no State can tax the privilege of doing interstate business. See *Western Live Stock v. Bureau*, 303 U.S. 250. . . . On the other hand, the mere fact that property is used for interstate commerce or has come into an owner's possession as a result of interstate commerce does not diminish the protection which he may draw from a State to the upkeep of which he may be asked to bear his fair share. . . .

. . . . The tax is what it professes to be. . . . The property is enjoyed by an Iowa resident partly because the opportunity is given by Iowa to enjoy property no matter whence acquired. The exaction is made against the ultimate consumer. . . . To make the distributor the tax collector for the State is a familiar and sanctioned device. . . .

MR. JUSTICE RUTLEDGE CONCURS. . . .

MR. JUSTICE JACKSON, dissenting:

This decision authorizes in my opinion an unwarranted extension of the power of a state to subject persons to its taxing power who are not within its jurisdiction and have not in any manner submitted themselves to it. . . . We have heretofore held, and I think properly, that the state may make tax collectors of those who come in and do business within its jurisdiction, for thereby they submit themselves to its power. Such was the situation in both *Monamotor Oil Co. v. Johnson*, 292 U.S. 86, and *Felt & Tarrant v. Gallagher*, 306 U.S. 62. These are the only authorities cited by the Court on this point, and they clearly are not precedents to support this decision.

In this case, as the opinion points out, the General Trading Company never qualified in Iowa and has no office, branch, warehouse, or general agent in the state. From Minnesota it ships goods ordered from salesmen by purchasers in Iowa. Orders are accepted only in Minnesota. The transaction of sale is not taxed and, being clearly interstate commerce, is not taxable. *McLeod v. Dilworth*, *ante*, p. 327. So we are holding that a state has power to make a tax collector of one whom it has no power to tax. Certainly no state has a constitutional warrant for making a tax collector of one as the price of the privilege of doing interstate commerce. He does not get the right from the state, and the state cannot qualify it. . . . Nor does the practice seem conducive to good order in the federal system. The power of Iowa to enforce collection in other states is certainly very limited and the effort to do so on any wide scale is unlikely either to be systematically pursued or successfully executed.

I recognize the pressure to uphold all manner of efforts to collect tax moneys. But this decision, by which one may not ship goods from anywhere in the United States to a purchaser in Iowa without becoming a nonresident tax collector, exceeds everything so far done by this Court. . . .

MR. JUSTICE ROBERTS joins in this opinion.

The Sales Tax

MC GOLDRICK v. BERWIND-WHITE COAL MINING CO.

Supreme Court of the United States. 1940.
309 U.S. 33.

MR. JUSTICE STONE delivered the opinion of the Court.

The question for decision is whether the New York City tax laid upon sales of goods for consumption, as applied to respondent, infringes the commerce clause of the Federal Constitution. . . .

(T)he municipal assembly of the City of New York . . . laid a tax upon purchasers for consumption of tangible personal property generally (except food and drugs furnished on prescription), of utility services in supplying gas, electricity, telephone service, etc., and of meals consumed in restaurants. By sec. 2 the tax was fixed at "two per centum upon the amount of the receipts from every sale in the city of New York." . . . Another clause of sec. 2 commands that the tax "shall be paid by the purchaser to the vendor, who is authorized to collect the tax, is required to charge it to the purchaser, separately from the sales

price; and is made liable, as an insurer, for its payment to the city. . . . In event of its nonpayment to the seller the buyer is required, within fifteen days after his purchase, to file a tax return and to pay the tax to the Comptroller. . . .

The ultimate burden of the tax, both in form and in substance, is thus laid upon the buyer, for consumption, of tangible personal property, and measured by the sales price. . . . It is conditioned by events occurring within the state, either transfer of title or possession of the purchased property, or an agreement within the state, "consummated" there, for the transfer of title, or possession. . . .

Respondent, a Pennsylvania corporation, is engaged in the production of coal of specified grades, said to possess unique qualities, from its mines within that state and in selling it to consumers and dealers. It maintains a sales office in New York City and sells annually to its customers, 1,500,000 tons of its product, of which approximately 1,300,000 tons are delivered by respondent to some twenty public utility and steamship companies. The coal moves by rail from mine to dock in Jersey City, thence in most instances by barge to the point of delivery. All the sales contracts with the New York customers in question were entered into in New York City, and with two exceptions . . . call for delivery of the coal by respondent by barge, alongside the purchasers' plants or steamships. . . . All the deliveries, with the exceptions already noted, were made within New York City, and all such are concededly subject to the tax insofar as it infringes the commerce clause. . . .

But it was not the purpose of the commerce clause to relieve those engaged in interstate commerce of their just share of state tax burdens, merely because an incidental or consequential effect of the tax is an increase in the cost of doing the business, *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 254. . . . Not all state taxation is to be condemned because, in some manner, it has an effect upon commerce between the states, and there are many forms of tax whose burdens, when distributed through the play of economic forces, affect interstate commerce, which nevertheless fall short of the regulation of the commerce which the Constitution leaves to Congress. A tax may be levied on net income wholly derived from interstate commerce. Nondiscriminatory taxation of the instrumentalities of interstate commerce is not prohibited. The like taxation of property, shipped interstate, before its movement begins, or after it ends, is not a forbidden regulation. An excise for the warehousing of merchandise preparatory to its interstate shipment or upon its use, or withdrawal for use, by the consignee after the interstate journey has ended is not precluded. Nor is taxation of a local business or occupation which is separate and distinct from the transportation or intercourse which is interstate commerce, forbidden

merely because in the ordinary course such transportation or intercourse is induced or occasioned by such business, or is prerequisite to it. . . .

In few of these cases can it be said with assurance that the local tax does not in some measure affect the commerce or increase the cost of doing it. But in them as in other instances of constitutional interpretation so as to insure the harmonious operation of powers reserved to the states with those conferred upon the national government, courts are called upon to reconcile competing constitutional demands, that commerce between the states shall not be unduly impeded by state action, and that the power to lay taxes for the support of state government shall not be unduly curtailed. . . .

Certain types of taxes may, if permitted at all, so readily be made the instrument of impeding or destroying interstate commerce as plainly to call for their condemnation as forbidden regulations. Such are the taxes already noted which are aimed at or discriminate against the commerce or impose a levy for the privilege of doing it, or tax interstate transportation or communication or their gross earnings, or levy an exaction on merchandise in the course of its interstate journey. Each imposes a burden which intrastate commerce does not bear, and merely because interstate commerce is being done places it at a disadvantage in comparison with intrastate business or property in circumstances such that if the asserted power to tax were sustained, the states would be left free to exert it to the detriment of the national commerce.

The present tax as applied to respondent is without the possibility of such consequences. Equality is its theme, *cf. Henneford v. Silas Mason Co.*, 300 U.S. 577, 583. . . . It does not aim at or discriminate against interstate commerce. It is laid upon every purchaser, within the state, of goods for consumption, regardless of whether they have been transported in interstate commerce. Its only relation to the commerce arises from the fact that immediately preceding transfer of possession to the purchaser within the state, which is the taxable event regardless of the time and place of passing title, the merchandise has been transported in interstate commerce and brought to its journey's end. Such a tax has no different effect upon interstate commerce than a tax on the "use" of property which has just been moved in interstate commerce sustained in *Mona-motor Oil Co. v. Johnson*, 292 U.S. 86 . . . or the tax on storage or withdrawal for use by the consignee of gasoline, similarly sustained in *Gregg Dyeing Co. v. Query*, 286 U.S. 472 . . . or the familiar property tax on goods by the state of destination at the conclusion of their interstate journey. . . .

If, as guides to decision we look to the purpose of the commerce clause to protect interstate commerce from discriminatory or destructive state action, and at the same time to the purpose of the state taxing power

under which interstate commerce admittedly must bear its fair share of state tax burdens, and to the necessity of judicial reconciliation of these competing demands, we can find no adequate ground for saying that the present tax is a regulation which, in the absence of Congressional action the commerce clause forbids. This Court has uniformly sustained a tax imposed by the state of the buyer upon a sale of goods, in several instances in the "original package," effected by delivery to the purchaser upon arrival at destination after an interstate journey, both when the local seller has purchased the goods extra-state for the purpose of resale, *Woodruff v. Parham*, 8 Wall. 123, and when the extra-state seller has shipped them into the taxing state for sale there. . . . *Sonneborn Bros. v. Cureton*, 262 U.S. 506. It has likewise sustained a fixed-sum license tax imposed upon the agent of the interstate seller for the privilege of selling merchandise brought into the taxing state for the purpose of sale. . . . *Wagner v. Covington*, 251 U.S. 104. . . .

The only challenge made to these controlling authorities is by reference to unconstitutional "burdens" on interstate commerce made in general statements which are inapplicable here because they are torn from their setting in judicial opinions and speak of state regulations or taxes of a different kind laid in different circumstances from those with which we are now concerned. . . . But unless we are now to reject the plain teaching of this line of sales tax decisions, extending back for more than seventy years, the present tax must be upheld. . . .

MR. CHIEF JUSTICE HUGHES, dissenting. . . .

In *Western Live Stock v. Bureau of Revenue*, *supra*, 303 U.S. page 256 we said: "The multiplication of state taxes measured by the gross receipts from interstate transactions would spell the destruction of interstate commerce and renew the barriers to interstate trade which it was the object of the commerce clause to remove." But petitioner has insisted that in the present case there is no danger of multiple taxation in that New York puts its tax upon an event which cannot occur in any other State. Of course the delivery of the coal in New York is an event which cannot occur in another State. Just as New York cannot tax the shipment of coal from the mines in Pennsylvania or the transshipment of the coal in New Jersey, so neither Pennsylvania nor New Jersey can tax the delivery in New York. Petitioner's argument misses the point as to the danger of multiple taxation in relation to interstate commerce. The shipment, the transshipment and the delivery of the coal are but parts of a unitary interstate transaction. They are integral parts of an interstate sale. . . . The point is not that the delivery in New York is an event which cannot be taxed by other States, but that the

authority of New York to impose a tax on that delivery cannot properly be recognized without also recognizing the authority of other States to tax the parts of the interstate transaction which take place within their borders. If New York can tax the delivery, Pennsylvania can tax the shipment and New Jersey the transshipment. And the latter States, respectively, would be as much entitled to tax the gross receipts from the sales as would New York. . . .

The tax as here applied is open to the same objection as a tariff upon the entrance of the coal into the State of New York, or a state tax upon the privilege of doing an interstate business, and in my view it cannot be sustained without abandoning principles long established and a host of precedents soundly based. . . .

[MR. JUSTICE McREYNOLDS and MR. JUSTICE ROBERTS concur in this dissent.]

MCLEOD, COMMISSIONER OF REVENUES, *v.* J. E. DILWORTH CO.

Supreme Court of the United States. 1944.
322 U.S. 327.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

We are asked to reverse a decision of the Supreme Court of Arkansas holding that the Commerce Clause precludes liability for the sales tax of that State upon the transactions to be set forth.

We take the descriptions of these transactions from the opinion under review. Respondents are Tennessee corporations with home offices and places of business in Memphis where they sell machinery and mill supplies. They are not qualified to do business in Arkansas and have neither sales office, branch plant nor any other place of business in that State. Orders for goods come to Tennessee through solicitation in Arkansas by traveling salesmen domiciled in Tennessee, by mail or telephone. But no matter how an order is placed it requires acceptance by the Memphis office, and on approval the goods are shipped from Tennessee. Title passes upon delivery to the carrier in Memphis, and collection of the sales price is not made in Arkansas. In short, we are here concerned with sales made by Tennessee vendors for the delivery of goods in Arkansas. . . .

We agree with the Arkansas Supreme Court that the *Berwind-White* case presented a situation different from this case and that this case is on the other side of the line which marks off the limits of state power. A boundary line is none the worse for being narrow. Once it is recognized,

as it long has been by this Court, that federal and state taxation do not move within wholly different orbits, that there are points of intersection between the powers of the two governments, and that there are transactions of what colloquially may be deemed a single process across state lines which may yet be taxed by the State of their occurrence, "nice distinctions are to be expected," *Galveston, H. & S. A. Ry. Co. v. Texas*, 210 U.S. 217, 225. The differentiations made by the court below between this case and the *Berwind-White* case are relevant and controlling. "The distinguishing point between the *Berwind-White* Coal case and the case at bar is that in the *Berwind-White* Coal case the corporation maintained its sales office in New York City, took its contracts in New York City, and made actual delivery in New York City. . . ." 205 Ark. at 786. This, according to practical notions of what constitutes a sale which is reflected by what the law deems a sale, constituted a sale in New York and accordingly we sustained a retail sales tax by New York. Here, as the Arkansas Supreme Court continued, "the offices are maintained in Tennessee, the sale is made in Tennessee, and the delivery is consummated either in Tennessee or in interstate commerce with no interruption from Tennessee until delivery to the consignee essential to complete the interstate journey." . . . We would have to destroy both business and legal notions to deny that under these circumstances the sale—the transfer of ownership—was made in Tennessee. For Arkansas to impose a tax on such transaction would be to project its powers beyond its boundaries and to tax an interstate transaction.

It is suggested, however, that Arkansas could have levied a tax of the same amount on the use of these goods in Arkansas by the Arkansas buyers, and that such a use tax would not exceed the limits upon state power derived from the United States Constitution. Whatever might be the fate of such a tax were it before us, the not too short answer is that Arkansas has chosen not to impose such a use tax, as its Supreme Court so emphatically found. A sales tax and a use tax in many instances may bring about the same result. But they are different in conception, are assessments upon different transactions, and in the interlacings of the two legislative authorities within our federation may have to justify themselves on different constitutional grounds. A sales tax is a tax on the freedom of purchase—a freedom which wartime restrictions serve to emphasize. A use tax is a tax on the enjoyment of that which was purchased. In view of the differences in the basis of these two taxes and the differences in the relation of the taxing State to them, a tax on an interstate sale like the one before us and unlike the tax on the enjoyment of the goods sold, involves an assumption of power by a State which the Commerce Clause was meant to end. The very purpose of the Commerce Clause was to create an area of free trade among the several States. That

clause vested the power of taxing a transaction forming an unbroken process of interstate commerce in the Congress, not in the States.

The difference in substance between a sales and a use tax was adverted to in the leading case sustaining a tax on the use after a sale had spent its interstate character: "A tax upon a use so closely connected with delivery as to be in substance a part thereof might be subject to the same objections that would be applicable to a tax upon the sale itself." *Henneford v. Silas Mason Co.*, 300 U.S. 577, 583. Thus we are not dealing with matters of nomenclature even though they be matters of nicety. . . .

A very different situation underlay *Wisconsin v. J. C. Penney Co.*, 311 U.S. 435. The Wisconsin Supreme Court and this Court were concerned with an exaction on a transaction which the Wisconsin Court described one way and we another. We looked behind the labels to the thing described, and the thing—taxation of the distribution of income earned in Wisconsin—did not offend the Federal Constitution. That case affords no ground for rejecting the deliberate choice of a State to impose a tax on a transfer of ownership and sustaining it, where the transfer was made beyond the State limits, as a use tax on that property because the State might, so far as the Federal Constitution is concerned, have enacted a use tax and such a use tax might have been collected on the enjoyment of the goods so sold. Such a mode of adjudication would imply a duty of excessive astuteness on our part to contract the area of free trade among the States. . . .

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK and MR. JUSTICE MURPHY concur, dissenting:

The present decision marks a retreat from the philosophy of the *Berwind-White* case, 309 U.S. 33. It draws a distinction between the use tax (*Felt & Tarrant Co. v. Gallagher*, 306 U.S. 62) and the sales tax which on the facts of this case seems irrelevant to the power of Arkansas to tax. . . .

Felt & Tarrant Co. v. Gallagher involved a use tax. The State of the buyer (California) was allowed to exact the tax from the Illinois seller for goods sold to California buyers though the seller's activities in California were not different in quality and hardly more numerous than the Arkansas activities of the Tennessee sellers in the present case. Though in some cases deliveries were made by the local agent for Felt & Tarrant, in others shipments were made by it from Illinois direct to the buyers in California. And in that case, as in the present case, the orders were accepted outside the State of the buyer and remittances were made direct to the out-of-State seller. . . .

It is not enough to say that the use tax and the sales tax are different.

A use tax may of course have a wider range of application than a sales tax. *Henneford v. Silas Mason Co.*, 300 U.S. 577. But a use tax and a sales tax applied at the very end of an interstate transaction have precisely the same economic incidence. Their effect on interstate commerce is identical. . . .

The sales tax and the use tax are, to be sure, taxes on different phases of the interstate transaction. We may agree that the use tax is a tax "on the enjoyment of that which was purchased." But realistically the sales tax is a tax on the receipt of that which was purchased. For as we said in the *Berwind-White* case , it is the "transfer of possession to the purchaser within the State" which is the "taxable event regardless of the time and place of passing title." In terms of state power, receipt of goods within the State of the buyer is as adequate a basis for the exercise of the taxing power as use within the State. And there should be no difference in result under the Commerce Clause where, as here, the practical impact on the interstate transaction is the same.

It is no answer to say that the Arkansas sales tax may not be imposed because the out-of-state seller was "through selling" when the tax was incurred. . . . There is no showing that Tennessee was exacting from these vendors a tax on these same transactions or that Arkansas discriminated against them. I can see no warrant for an interpretation of the Commerce Clause which puts local industry at a competitive disadvantage with interstate business. If there is a taxable event within the State of the buyer, I would make the result under the Commerce Clause turn on practical considerations and business realities rather than on dialectics. If that is not done, I think we should retreat from the view that interstate commerce should carry its fair share of the costs of government in the localities where it finds its markets and adopt the views expressed in the dissent in the *Berwind-White* case.

CHAPTER VII

The Monetary Powers of the Federal Government

To Regulate the Currency

VEAZIE BANK *v.* FENNO.

Supreme Court of the United States. 1869.
8 Wallace 533.

[Congress enacted a law in 1866 which taxed every national and state bank ten per cent. on the amount of notes issued by it and placed in circulation. The Veazi Bank was chartered by the State of Maine with authority to issue notes for placement in circulation. The bank paid the tax under protest and then brought suit to recover the amount paid on the ground that the congressional statute was unconstitutional as an unapportioned direct tax and, further, as a violation of the 10th Amendment.]

MR. CHIEF JUSTICE CHASE delivered the opinion of the court. . . .

The general question now before us is, whether or not the tax of ten per cent., imposed on State banks or National banks paying out the notes of individuals or State banks used for circulation, is repugnant to the Constitution of the United States.

In support of the position that the act of Congress, so far as it provides for the levy and collection of this tax, is repugnant to the Constitution, two propositions have been argued with much force and earnestness.

The first is that the tax in question is a direct tax, and has not been apportioned among the States agreeably to the Constitution.

The second is that the act imposing the tax impairs a franchise granted by the State, and that Congress has no power to pass any law with that intent or effect.

The first of these propositions will be first examined. . . .

Much diversity of opinion has always prevailed upon the question, what are direct taxes? Attempts to answer it by reference to the definitions of political economists have been frequently made, but without satisfactory results. The enumeration of the different kinds of taxes

which Congress was authorized to impose was probably made with little reference to their speculations. . . . We are obliged therefore to resort to historical evidence, and to seek the meaning of the words in the use and in the opinion of those whose relations to the government, and means of knowledge, warranted them in speaking with authority. And considered in this light, the meaning and application of the rule, as to direct taxes, appears to us quite clear. It is, as we think, distinctly shown in every act of Congress on the subject.

In each of these acts, a gross sum was laid upon the United States, and the total amount was apportioned to the several States, according to their respective number of inhabitants, as ascertained by the last preceding census. Having been apportioned, provision was made for the imposition of the tax upon the subjects specified in the act, fixing its total sum. . . . In each instance, the total sum was apportioned among the States, by the constitutional rule, and was assessed at prescribed rates, on the subjects of the tax. These subjects, in 1798, . . . were lands, improvements, dwelling-houses, and slaves; and in 1861, lands, improvements, and dwelling-houses only. . . . This review shows that personal property, contracts, occupations, and the like have never been regarded by Congress as proper subjects of direct tax. . . .

It may be safely assumed [upon the authority of *Hylton v. United States*] . . . that a tax on carriages is not a direct tax. And it may further be taken as established upon the testimony of Paterson, that the words direct taxes, as used in the Constitution, comprehended only capitation taxes, and taxes on land, and perhaps taxes on personal property by general valuation and assessment of the various descriptions possessed within the several States.

It follows necessarily that the power to tax without apportionment extends to all other objects. Taxes on other objects are included under the heads of taxes not direct, duties, imposts, and excises, and must be laid and collected by the rule of uniformity. The tax under consideration is a tax on bank circulation, and may very well be classed under the head of duties. Certainly it is not, in the sense of the Constitution, a direct tax. It may be said to come within the same category of taxation as the tax on incomes of insurance companies, which this court, at the last term, in the case of *Pacific Insurance Company v. Soule*, 7 Wallace, 434, held not to be a direct tax.

Is it, then, a tax on a franchise granted by a State, which Congress, upon any principle exempting the reserved powers of the States from impairment by taxation, must be held to have no authority to lay and collect? We do not say that there may not be such a tax. It may be admitted that the reserved rights of the States, such as the right to pass laws, to give effect to laws through executive action, to administer

justice through the courts, and to employ all necessary agencies for legitimate purposes, are not proper subjects of the taxing power of Congress. But it cannot be admitted that franchises granted by a State are necessarily exempt from taxation; for franchises are property, often very valuable and productive property; and when not conferred for the purpose of giving effect to some reserved power of a State, seem to be as properly objects of taxation as any other property.

But in the case before us the object of taxation is not the franchise of the bank, but property created, or contracts made and issued under the franchise, or power to issue bank bills. A railroad company, in the exercise of its corporate franchises, issues freight receipts, bills of lading, and passenger tickets; and it cannot be doubted that the organization of railroads is quite as important to the State as the organization of banks. But it will hardly be questioned that these contracts of the company are objects of taxation within the powers of Congress, and not exempted by any relation to the State which granted the charter of the railroad. And it seems difficult to distinguish the taxation of notes issued for circulation from the taxation of these railroad contracts. Both descriptions of contracts are means of profit to the corporations which issue them; and both, as we think, may properly be made contributory to the public revenue.

It is insisted, however, that the tax in the case before us is excessive, and so excessive as to indicate a purpose on the part of Congress to destroy the franchise of the bank, and is, therefore, beyond the constitutional power of Congress.

The first answer to this is that the judicial cannot prescribe to the legislative department of the government limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons, but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected. So if a particular tax bears heavily upon a corporation, or a class of corporations, it cannot, for that reason only, be pronounced contrary to the Constitution.

But there is another answer which vindicates equally the wisdom and the power of Congress.

It cannot be doubted that under the Constitution the power to provide a circulation of coin is given to Congress. And it is settled by the uniform practice of the government and by repeated decisions, that Congress may constitutionally authorize the emission of bills of credit. It is not important here, to decide whether the quality of legal tender in payment of debts, can be constitutionally imparted to those bills; it is enough to say, that there can be no question of the power of the government to emit them; to make them receivable in payment of debts to

itself; to fit them for use by those who see fit to use them in all the transactions of commerce; to provide for their redemption; to make them a currency, uniform in value and description, and convenient and useful for circulation. These powers, until recently, were only partially and occasionally exercised. Lately, however, they have been called into full activity, and Congress has undertaken to supply a currency for the entire country.

The methods adopted for the supply of this currency were briefly explained in the first part of this opinion. It now consists of coin, of United States notes, and of the notes of the national banks. Both descriptions of notes may be properly described as bills of credit, for both are furnished by the government; both are used on the credit of the government; and the government is responsible for the redemption of both; primarily as to the first description, and immediately upon default of the bank, as to the second. When these bills shall be made convertible into coin, at the will of the holder, this currency will, perhaps, satisfy the wants of the community, in respect to a circulating medium, as perfectly as any mixed currency that can be devised.

Having thus, in the exercise of undisputed constitutional powers, undertaken to provide a currency for the whole country, it cannot be questioned that Congress may, constitutionally, secure the benefit of it to the people by appropriate legislation. To this end, Congress has denied the quality of legal tender to foreign coins, and has provided by law against the imposition of counterfeit and base coin on the community. To the same end, Congress may restrain, by suitable enactment, the circulation as money of any notes not issued under its own authority. Without this power, indeed, its attempts to secure a sound and uniform currency for the country must be futile.

Viewed in this light, as well as in the other light of a duty on contracts or property, we cannot doubt the constitutionality of the tax under consideration. . . .

MR. JUSTICE NELSON, with whom concurred MR. JUSTICE DAVIS, dissenting. . . .

LEGAL TENDER CASES.

JUILLIARD *v.* GREENMAN.

Supreme Court of the United States. 1884.

110 U.S. 421.

[Plaintiff sold to defendant 100 bales of cotton for \$5,122.90. Defendant offered to plaintiff in payment of the price, the following sums of

money: \$22.50 in gold coin; 40¢ in silver coin; two United States notes, one for \$100 and the other for \$5000, which were legal tender under the Act of Congress of May 31, 1878. Plaintiff accepted the coin and rejected the notes. Defendant offered only the notes; whereupon plaintiff brought suit to compel payment of the debt, with interest. Defendant won judgment in the lower court.]

MR. JUSTICE GRAY delivered the opinion of the court. . . .

The notes of the United States, tendered in payment of the defendant's debt to the plaintiff, were originally issued under the acts of Congress passed during the war of the rebellion, and enacting that these notes should "be lawful money and a legal tender in payment of all debts, public and private, within the United States," except for duties on imports and interest on the public debt. 12 Stat. 345, 532, 709. . . .

The act of January 14th, 1875, ch. 15, "to provide for the resumption of specie payments," enacted that on and after January 1st, 1879, "the Secretary of the Treasury shall redeem in coin the United States legal tender notes then outstanding. . . ."

The act of May 31st, 1878, ch. 146, under which the notes in question were reissued, is entitled "An act to forbid the further retirement of United States legal tender notes"

The manifest intention of this act is that the notes which it directs, after having been redeemed, to be reissued and kept in circulation, shall retain their original quality of being a legal tender.

The single question to be considered is whether notes of the United States, issued in time of war and afterwards in time of peace redeemed and then reissued can, under the Constitution be a legal tender in payment of debts.

Upon full consideration of the case, the court is unanimously of opinion that it cannot be distinguished in principle from the cases heretofore determined, reported under the names of the *Legal Tender Cases*, 12 Wall. 457 and all the judges, except Mr. Justice Field, who adheres to the views expressed in his dissenting opinions in those cases, are of opinion that they were rightly decided.

No question of the scope and extent of the implied powers of Congress under the Constitution can be satisfactorily discussed without repeating much of the reasoning of Chief Justice Marshall in the great judgment in *McCulloch v. Maryland*, 4 Wheat. 316. . . .

A constitution, establishing a frame of government, declaring fundamental principles, and creating a national sovereignty, and intended to endure for ages and to be adapted to the various crises of human affairs, is not to be interpreted with the strictness of a private contract. . . .

That clause of the Constitution which declares that "the Congress shall have the power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States," either embodies a grant of power to pay the debts of the United States, or presupposes and assumes that power as inherent in the United States as a sovereign government. But, in which ever aspect it be considered, neither this nor any other clause of the Constitution makes any mention of priority or preference of the United States as a creditor over other creditors of an individual debtor. Yet this court, in the early case of *United States v. Fisher*, 2 Cranch, 358, held that, under the power to pay the debts of the United States, Congress had the power to enact that debts due to the United States should have that priority of payment out of the estate of an insolvent debtor, which the law of England [then] gave to debts due the Crown.

In delivering judgment in that case, Chief Justice Marshall expounded the clause giving Congress power to make all necessary and proper laws, as follows: "In construing this clause, it would be incorrect, and would produce endless difficulties, if the opinion should be maintained that no law was authorized which was not indispensably necessary to give effect to a specified power. Where various systems might be adopted for that purpose, it might be said with respect to each, that it was not necessary, because the end might be obtained by other means. Congress must possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the Constitution. The government is to pay the debt of the Union, and must be authorized to use the means which appear to itself the most eligible to effect that object." 2 Cranch, 396.

In *McCulloch v. Maryland*, he more fully developed the same view, concluding thus: ". . . Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional." 4 Wheat. 421.

The rule of interpretation thus laid down has been constantly adhered to and acted on by this court, and was accepted as expressing the true test by all the judges who took part in the former discussions of the power of Congress to make the treasury notes of the United States a legal tender in payment of private debts. . . .

The words "to borrow money," as used in the Constitution, to designate a power vested in the national government, for the safety and welfare of the whole people, are not to receive that limited and restricted interpretation and meaning which they would have in a penal statute,

or in an authority conferred, by law or by contract, upon trustees or agents for private purposes.

The power "to borrow money on the credit of the United States" is the power to raise money for the public use on a pledge of the public credit, and may be exercised to meet either present or anticipated expenses and liabilities of the government. It includes the power to issue, in return for the money borrowed, the obligations of the United States in any appropriate form, of stock, bonds, bills or notes; and in whatever form they are issued, being instruments of the national government, they are exempt from taxation by the governments of the several States. . . . Congress has authority to issue these obligations in a form adapted to circulation from hand to hand in the ordinary transactions of commerce and business. In order to promote and facilitate such circulation, to adapt them to use as currency, and to make them more current in the market, it may provide for their redemption in coin or bonds, and may make them receivable in payment of debts to the government. So much is settled beyond doubt, and was asserted or distinctly admitted by the judges who dissented from the decision in the *Legal Tender Cases*, as well as by those who concurred in that decision. . . .

The constitutional authority of Congress to provide a currency for the whole country is now firmly established. [*Veazie Bank v. Fenno*, 8 Wall. 533 (1869).] . . .

It appears to us to follow, as a logical and necessary consequence, that Congress has the power to issue the obligations of the United States in such form, and to impress upon them such qualities as currency for the purchase of merchandise and the payment of debts, as accord with the usage of sovereign governments. The power . . . was a power universally understood to belong to sovereignty, in Europe and America, at the time of the framing and adoption of the Constitution of the United States. . . . The exercise of this power not being prohibited to Congress by the Constitution, it is included in the power expressly granted to borrow money on the credit of the United States. . . .

The power of making the notes of the United States a legal tender in payment of private debts, being included in the power to borrow money and to provide a national currency, is not defeated or restricted by the fact that its exercise may affect the value of private contracts. . . . The decisions of this court, already cited, afford several examples of this.

So, under the power to coin money and to regulate its value, Congress may (as it did with regard to gold by the act of June 28th, 1834, ch. 95, and with regard to silver by the act of February 28th, 1878, ch. 20) issue coins of the same denomination as those already current by law, but of less intrinsic value than those, by reason of containing

a less weight of the precious metals, and thereby enabled debtors to discharge their debts by the payment of coins of the less real value. A contract to pay a certain sum in money, without any stipulation as to the kind of money in which it shall be paid, may always be satisfied by payment of that sum in any currency which is lawful money at the place and time at which payment is to be made. . . . As observed by Mr. Justice Strong, in delivering the opinion of the court in the *Legal Tender Cases*, "Every contract for the payment of money, simply, is necessarily subject to the constitutional power of the government over the currency, whatever that power may be, and the obligation of the parties is, therefore, assumed with reference to that power." 12 Wall. 549.

Congress, as the legislature of a sovereign nation, being expressly empowered by the Constitution "to lay and collect taxes, to pay the debts and provide for the common defence and general welfare of the United States," and "to borrow money on the credit of the United States," and "to coin money and regulate the value thereof and of foreign coin;" and being clearly authorized, as incidental to the exercise of those great powers, to emit bills of credit, to charter national banks, and to provide a national currency for the whole people, in the form of coin, treasury notes, and national bank bills; and the power to make the notes of the government a legal tender in payment of private debts being one of the powers belonging to sovereignty in other civilized nations, and not expressly withheld from Congress by the Constitution; we are irresistibly impelled to the conclusion that the impressing upon the treasury notes of the United States the quality of being legal tender in payment of private debts is an appropriate means, conducive and plainly adapted to the execution of the undoubted powers of Congress, consistent with the letter and spirit of the Constitution, and therefore, within the meaning of that instrument, "necessary and proper for carrying into execution the powers vested by this Constitution in the government of the United States."

Such being our conclusion in matter of law, the question whether at any particular time, in war or in peace, the exigency is such, by reason of unusual and pressing demands on the resources of the government, or of the inadequacy of the supply of gold and silver coin to furnish the currency needed for the uses of the government and of the people, that it is, as matter of fact, wise and expedient to resort to this means, is a political question, to be determined by Congress when the question of exigency arises, and not a judicial question, to be afterwards passed upon by the courts. . . .

It follows that the act of May 31st, 1878, ch. 146, is constitutional and valid; . . . that the tender in treasury notes, reissued and kept in circula-

tion under that act, was a tender of lawful money in payment of the defendant's debt to the plaintiff.

MR. JUSTICE FIELD, dissenting.

From the judgment of the court in this case, and from all the positions advanced in its support, I dissent. . . .

If there be anything in the history of the Constitution which can be established with moral certainty, it is that the framers of that instrument intended to prohibit the issue of legal tender notes both by the general government and by the States; and thus prevent interference with the contracts of private parties. . . . [2 Story on the Constitution, # 1371; *Sturges v. Crowninshield*, 4 Wheat. 122, 206.]

As to the terms *to borrow money*, where, I would ask, does the court find any authority for giving to them a different interpretation in the Constitution from what they receive when used in other instruments, as in the charters of municipal bodies or of private corporations, or in the contracts of individuals? They are not ambiguous; they have a well-settled meaning in other instruments. If the court may change that in the Constitution, so it may the meaning of all other clauses; and the powers which the government may exercise will be found declared; not by plain words in the organic law, but by words of a new significance resting in the minds of the judges. Until some authority beyond the alleged claim and practice of the sovereign governments of Europe be produced, I must believe that the terms have the same meaning in all instruments wherever they are used; that they mean a power only to contract for a loan of money, upon considerations to be agreed between the parties. . . .

But beyond and above all the objections which I have stated to the decision recognizing a power in Congress to impart the legal tender quality to the notes of the government, is my objection to the rule of construction adopted by the court to reach its conclusions, a rule which fully carried out would change the whole nature of our Constitution and break down the barriers which separate a government of limited from one of unlimited powers. When the Constitution came before the conventions of the several States for adoption, apprehension existed that other powers than those designated might be claimed; and it led to the first ten amendments. . . . One of them is found in the Tenth Amendment, which declares that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." . . . Of what purpose is it then to refer to the exercise of the power by the absolute or the limited governments of Europe, or by the States previous to our

Constitution. Congress can exercise no power by virtue of any supposed inherent sovereignty in the general government. . . . It is a government of delegated powers, supreme within its prescribed sphere, but powerless outside of it. In this country sovereignty resides in the people, and Congress can exercise no power which they have not, by their Constitution, entrusted to it; all else is withheld. It seems, however, to be supposed that, as the power was taken from the States, it could not have been intended that it should disappear entirely, and therefore it must in some way adhere to the general government, notwithstanding the Tenth Amendment and the nature of the Constitution. The doctrine, that a power not expressly forbidden may be exercised, would, as I have observed, change the character of our government. If I have read the Constitution aright, if there is any weight to be given to the uniform teachings of our great jurists and of commentators previous to the late civil war, the true doctrine is the very opposite of this. If the power is not in terms granted, and is not necessary and proper for the exercise of a power which is thus granted, it does not exist. . . .

NOTE ON THE LEGAL TENDER CASES

Controversy over paper money rocked the country throughout the 60's and 70's. It produced one of the greatest judicial battles in the annals of the Supreme Court. *Juilliard v. Greenman* marks its end in the Court, and only Mr. Justice Field is left to carry the dissent. For the judicial history of the controversy, see Warren, *op. cit.*, vol. iii, ch. xxxi; Boudin; *op. cit.*, vol. ii, ch. xxv.

The portion of the dissent given here is important for its attack on the doctrine of inherent power. The Court has been careful in subsequent decisions to confine the application of the doctrine to the field of international relations. Yet it can not be said that the rule of construction implied therein is definitely rejected, in view of the Court's skill at drawing distinctions when it seems advisable to make a change of position. As late as 1921, Mr. Justice Holmes, speaking for a majority of the Court in the rent cases, said "the question is whether Congress was incompetent to meet it [the housing shortage] in the way in which it has been met by most of the civilized countries of the world." *Block v. Hirsh*, 256 U.S. 135, given in the section on the police power. On the other hand, in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), given in the chapter on the judicial theory of the Constitution, the Court negatives in respect of internal affairs the doctrine of inherent power.

The student should note that the decision stands without the use of the doctrine under consideration. Mr. Justice Gray rests his argument

on the broad construction of the necessary and proper clause first announced by Chief Justice Marshall. The finding of inherent power is only collateral to the main argument. Mr. Justice Gray's argument is really a sweeping use of the doctrine of implied powers. Mr. Justice Field might have pointed out that the implications of the enumerated powers "rest in the minds of the judges" also. The student may find it profitable to note that this type of observation occurs in minority opinions. The editor has been unable to find a single instance of its expression in the opinion of a justice who is speaking for the Court. Commentators both lay and legal of course explain this difference by the change in position of the justice. The explanation, though, is hardly better than a distinction without a difference. The problem remains: why should a majority position obscure, and a minority position clarify, the process of reasoning by which a decision is upheld? It is curious that majority opinions do not accuse the dissenting justices of reading their own views into the Constitution. In a close case there are, now and then, *intimations* of this transfusion; yet these are exceptional. Ordinarily, the majority justices are closely engaged in guarding themselves from the onslaughts of their dissenting brethren. In repudiating the assumption that they have done nothing more than veil their own presuppositions with constitutional principles, they are able to assert their own objectivity of view. At this point in what is fundamentally a dialectical strategy, the implication is clear that the dissenting justices are less than objective. Yet it remains an implication; not direct; not frank; essentially negative. It is a defense. Objectivity is of the essence. The Court must not question the wisdom of the legislature; its function is to match the terms of the legislature's statute against the applicable provisions of the Constitution. Thus the majority's position must always be that the Constitution speaks with its own voice. This is the minority's view, too. *Their* point is only that the majority has confused the voice of the Constitution with their own voices and mistaken their own for law.

The speculation may be hazarded that this is why a change in position has the effect of enabling a former minority justice to forget his criticisms. There is a judicial outlook, an *esprit de corps*, common to all the members of the supreme bench. No member of the Supreme Court, whatever his attitude towards a decision, can take the ground that he has enforced an economic theory which he adheres to in preference to one which he has rejected; or that he has substituted his wisdom for that of the legislature; or that he has passed judgment on the effect of a given legislative policy; or that he has been controlled by the speculative consequences of a statute; or that he has been unreasonable, arbitrary, or capricious. Every justice, regardless of his place in the vote

which gives the decision, is compelled by the functions of his office to hold that he has done no more than to enforce the superior instrument: the Constitution.

In the controversy over the power of the federal government to make its treasury notes legal tender, the following are the leading cases: *Bronson v. Rodes*, 7 Wall. 229 (1867); *Hepburn v. Griswold*, 8 Wall. 603 (1869); *Knox v. Lee*, 12 Wall. 457 (1871); *Trebilcock v. Wilson*, 12 Wall. 687 (1872); and the principal case.

NORMAN v. BALTIMORE & OHIO RAILROAD CO.

Supreme Court of the United States. 1935.
294 U.S. 240.

MR. CHIEF JUSTICE HUGHES. . . . Second The Constitution grants to the Congress power "To coin money, regulate the value thereof, and of foreign coin." Art. I, sec. 8, par. 5. But the Court in the legal tender cases did not derive from that express grant alone the full authority of the Congress in relation to the currency. The Court found the source of that authority in all the related powers conferred upon the Congress and appropriate to achieve "the great objects for which the government was framed"—"a national government, with sovereign powers."

The broad and comprehensive national authority over the subjects of revenue, finance and currency is derived from the aggregate of the powers granted to the Congress, embracing the powers to lay and collect taxes, to borrow money, to regulate commerce with foreign nations and among the several states, to coin money, regulate the value thereof, and of foreign coin, and fix the standards of weights and measures, and the added express power "to make all laws which shall be necessary and proper for carrying into execution" the other enumerated powers. *Juilliard v. Greenman*, *supra*, pp. 439, 440. . . .

Moreover, by virtue of this national power, there attaches to the ownership of gold and silver those limitations which public policy may require by reason of their quality as legal tender and as a medium of exchange. . . . Those limitations arise from the fact that the law "gives to such coinage a value which does not attach as a mere consequence of intrinsic value." Their quality as legal tender is attributed by the law, aside from their bullion value. Hence the power to coin money includes the power to forbid mutilation, melting and exportation of gold and silver coin,—"to prevent its outflow from the country of its origin." *Ling Su Fan v. United States*, 218 U.S. 302, 310, 311.

Dealing with the specific question as to the effect of the legal tender

acts upon contracts made before their passage, that is, those providing for the payment of money generally, the Court, in the legal tender cases, recognized the possible consequences of such enactments in frustrating the expected performance of contracts,—in rendering them “fruitless or partially fruitless.” The Court pointed out that the exercise of the powers of Congress may affect “apparent obligations” of contracts in many ways. The Congress may pass bankruptcy acts. The Congress may declare war, or even in peace, pass non-intercourse acts, or direct an embargo, which may operate seriously upon existing contracts. . . . *Knox v. Lee*, 12 Wall. 457, 549-551.

On similar grounds, the Court dismissed the contention under the Fifth Amendment forbidding the taking of private property for public use without just compensation or the deprivation of it without due process of law. That provision, said the Court, referred only to direct appropriation. . . . The Court referred to the Act of June 28, 1834, by which a new regulation of the weight and value of gold coin was adopted, and about six per cent. was taken from the weight of each dollar. The effect of the measure was that all creditors were subjected to a corresponding loss, as the debts then due “became solvable with six per cent. less gold than was required to pay them before.” . . . The harshness of such legislation, or the hardship it may cause, afforded no reason for considering it to be unconstitutional. *Id.*, pp. 551, 552. . . .

[For the facts and the remainder of the opinion, see page 152 of Chapter 3.]

To Pay the Debts

BURNET *v.* BROOKS.

Supreme Court of the United States. 1933.
288 U.S. 378.

MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court.

Respondents contested the determination of the Commissioner of Internal Revenue in including in the gross estate of decedent certain intangible property. Decedent, who died in October, 1924, was a subject of Great Britain and a resident of Cuba. He was not engaged in business in the United States. The property in question consisted of securities, viz., bonds of foreign corporations, bonds of foreign governments, bonds of domestic corporations and of a domestic municipality, and stock in a foreign corporation, and also of a balance of a cash deposit. . . . Finding these facts, the Board of Tax Appeals decided that the property

should not be included in the decedent's gross estate for the purpose of the federal estate tax, and the decision was affirmed by the Circuit Court of Appeals. This Court granted certiorari. . . .

First. The first question is one of legislative intention. In the case of a nonresident of the United States, that part of the gross estate was to be returned and valued "which at the time of his death is situated in the United States." The Congress was exercising its taxing power. Defining the subject of its exercise, the Congress resorted to a general description referring to the situs of the property. The statute made no distinction between tangible and intangible property. As to tangibles and intangibles alike, it made the test one of situs. The argument is pressed that the reference to situs must, as to intangibles, be taken to incorporate the principle of *mobilia sequuntur personam* and thus, for example, that the bonds here in question though physically in New York should be regarded as situated in Cuba where decedent resided. But the Congress did not enact a maxim. When the statute was passed it was well established that the taxing power could reach such securities in the view that they had a situs where they were physically located. . . .

Second. The question of power to lay the tax. As a nation with all the attributes of sovereignty, the United States is vested with all the powers of government necessary to maintain an effective control of international relations *Knox v. Lee*, 12 Wall. 457, 555, 556. So far as our relation to other nations is concerned, and apart from any self-imposed constitutional restriction, we cannot fail to regard the property in question as being within the jurisdiction of the United States; that is, it was property within the reach of the power which the United States by virtue of its sovereignty could exercise as against other nations and their subjects without violating any established principle of international law. This view of the scope of the sovereign power in the matter of the taxation of securities physically within the territorial limits of the sovereign is sustained by high authority and is a postulate of legislative action in other countries. . . .

Respondents urge that constitutional restriction precluding the federal estate tax in question is found in the due process clause of the Fifth Amendment. Respondents' reliance is upon the decisions of this Court with respect to the limitation of the taxing power of the states under the due process clause of the Fourteenth Amendment. *Farmers' Loan & Trust Co. v. Minnesota*, 280 U.S. 204 . . . *First National Bank of Boston v. Maine*, 284 U.S. 312. They insist that the like clause of the Fifth Amendment imposes a corresponding restriction upon the taxing power of the federal government.

The argument is specious, but it ignores an established distinction.

Due process requires that the limits of jurisdiction shall not be transgressed. That requirement leaves the limits of jurisdiction to be ascertained in each case with appropriate regard to the distinct spheres of activity of state and nation. The limits of state power are defined in view of the relation of the states to each other in the Federal Union. This is the principle which underlies the decisions cited by respondents. These decisions established that proper regard for the relation of the states in our system required that the property under consideration should be taxed in only one state, and that jurisdiction to tax was restricted accordingly. In *Farmers' Loan & Trust Co. v. Minnesota*, *supra*, the Court applied the principle to intangibles, and referring to the contrary view [applied in *Blackstone v. Miller*, 188 U.S. 189 (1903)] which had prevailed, said (page 209 of 280 U.S.): "The inevitable tendency of that view is to disturb good relations among the states and produce the kind of discontent expected to subside after establishment of the Union. *The Federalist*, No. VII. The practical effect of it has been bad; perhaps two-thirds of the states have endeavored to avoid the evil by resort to reciprocal exemption laws." It was this "rule of immunity from taxation by more than one state," deducible from the decisions in respect of various and distinct kinds of property, that the Court applied in *First National Bank v. Maine*, *supra*, page 326 of 284, U.S. . . .

But it has been as decisively maintained that this principle, thus progressively applied in limiting the jurisdiction of the states to tax, does not restrict the taxing power of the federal government. The distinction was clearly and definitely made in *United States v. Bennett*, 232 U.S. 299. . . . The levy of the tax with respect to a yacht owned by a citizen of the United States, domiciled here, but which was not used within the jurisdiction of the United States and had its permanent situs in a foreign country, was resisted under the due process clause of the Fifth Amendment. The objector invoked the doctrine, already established, which denied to a state, under the Fourteenth Amendment, jurisdiction to tax personal property which had a permanent situs in another state. . . . Speaking through Chief Justice White. . . . "The confusion results," the Court continued, "from not observing that the rule applied in the cases relied upon to many forms of exertion of state taxing power is based on the limitations on state authority to tax resulting from the distribution of powers ordained by the Constitution. . . ." "But this," the Court added, "has no application to the government of the United States so far as its admitted taxing power is concerned," for that power "embraces all the attributes which appertain to sovereignty in the fullest sense. . . . Because the limitations of the Constitution are barriers bordering the states and preventing them from transcending the limits of their authority, and thus destroying the rights of other

states, and at the same time saving their rights from destruction by the other states, in other words, of maintaining and preserving the rights of all the states, affords no ground for constructing an imaginary constitutional barrier around the exterior confines of the United States for the purpose of shutting that government off from the exertion of powers which inherently belong to it by virtue of its sovereignty." *Id.*, pages 305, 306 of 232 U.S. . . .

The distinction cannot be regarded as limited to tangible property. It has equal application to intangibles. . . . The decisive point is that the criterion of state taxing power by virtue of the relation of the states to each other under the Constitution is not the criterion of the taxing power of the United States by virtue of its sovereignty in relation to the property of nonresidents. The Constitution creates no such relation between the United States and foreign countries as it creates between the states themselves. . . .

CINCINNATI SOAP CO. v. UNITED STATES.

Supreme Court of the United States. 1937.
301 U.S. 308.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

Section 602½ of the Revenue Act of 1934, c. 277, . . . imposes a tax of 3 cents per pound upon the first domestic processing of coconut oil, and provides that all such taxes collected with respect to coconut oil wholly of Philippine production, etc., "shall be held as a separate fund and paid to the Treasury of the Philippine Islands. . . ."

The validity of the tax is assailed by petitioners upon a variety of grounds. . . .

First. Plainly, the imposition of the tax in itself is a valid exercise of the taxing power of the federal government. It is purely an excise tax upon a manufacturing process for revenue purposes, and in no sense a regulation of the process itself. The Tenth Amendment is without application, since the powers of the several states over local affairs are not invaded or involved. . . .

Second. Standing apart, therefore, the tax is unassailable. It is said to be bad because it is earmarked and devoted from its inception to a specific purpose. But if the tax, *qua* tax, be good, as we hold it is, and the purpose specified be one which would sustain a subsequent and separate appropriation made out of the general funds of the Treasury, neither is made invalid by being bound to the other in the same act of legislation. . . .

We inquire first—Is the proposed *appropriation* to the Philippine Treasury for a constitutional purpose? The pertinent taxing clause provides in general terms (Art. I, # 8, cl. 1) that taxes may be laid “to pay the Debts and provide for the common Defence and general Welfare of the United States.” Primarily, and in a very high degree, whether a tax serves any of these purposes is a practical question addressed to the law-making department. And it will require a very plain case to warrant the courts in setting aside the conclusion of Congress in that regard. . . . Nevertheless, such plain cases may exist; and the question is whether this is one of them.

The Philippine Islands and their inhabitants, from the beginning of our occupation, have borne a peculiar relation to the United States. The Islands constitute a dependency over which the United States, for more than a generation, has had and exercised supreme power of legislation and administration a power limited only by the terms of the treaty of cession and those principles of the Constitution which by their nature are inherently inviolable. . . .

It may be that the tax and the appropriation of the proceeds therefrom in the present instance could be justified as an exercise of the taxing power to provide, in a broad sense, for the public defense or the general welfare of the United States. We do not pause to consider that view; for plainly, we think, the law may be sustained as an act in discharge of a high moral obligation, amounting to a “debt” within the meaning of the Constitution as it always has been practically construed. . . . “What are the debts of the United States within the meaning of this constitutional provision? The term ‘debts’ includes those debts or claims which rest upon a merely equitable or honorary obligation, and which would not be recoverable in a court of law if existing against an individual. The nation, speaking broadly, owes a ‘debt’ to an individual when his claim grows out of general principles of right and justice; when, in other words, it is based upon considerations of a moral or merely honorary nature, such as are binding on the conscience or the honor of an individual, although the debt could obtain no recognition in a court of law. The power of Congress extends at least as far as the recognition and payment of claims against the government which are thus founded.” [*United States v. Realty Co.*, 163 U.S. 427, 440-441.]

Later decisions of this court have followed that view. The determination of Congress to recognize the moral obligation of the nation to make an appropriation as a requirement of justice and honor, is obviously a matter of policy and discretion not open to judicial review unless in circumstances which here we are not able to find. . . .

It does not follow that because a federal tax levied for the express

purpose of paying the debts or providing for the welfare of a state might be invalid that such a tax for the uses of a territory or dependency would likewise be invalid. A state, except as the Federal Constitution otherwise requires, is supreme and independent. It has its own government, with full powers of taxation. . . . A dependency has no government but that of the United States, except in so far as the United States may permit. . . .

. . . . We find the legislation to be free from constitutional infirmity; and there both our power and responsibility end.

To Provide for the General Welfare

UNITED STATES *v.* BUTLER.

Supreme Court of the United States. 1936.

297 U.S. 1.

Certiorari to review a decree which reversed an order of the District Court (*Franklin Process Co. v. Hoosac Mills Corp.*, 8 F. Supp. 552), directing the receivers of Hoosac Mills, a cotton milling corporation, to pay claims of the United States for processing and floor taxes on cotton, levied under §§ 9 and 16 of the Agricultural Adjustment Act of May 12, 1933. . . .

SOLICITOR GENERAL REED, orally, after stating the case. . . .

As a part of this concerted effort to bring about recovery, the Agricultural Adjustment Act was passed. It should not, however, be approached as an emergency measure. . . .

The Act opens with a declaration of emergency, and passes on to a declaration of policy. . . .

The essence of the declaration is that Congress hopes to re-establish prices to farmers at a level that will give agricultural commodities a purchasing power, with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period. . . .

The question of the validity of the Agricultural Adjustment Act as a tax or revenue statute alone is dependent upon a consideration of the cases which this Court has decided, namely, the *Child Labor Tax* case, 259 U.S. 20, and the case of *Hill v. Wallace*, 259 U.S. 44, upon the one side, and *United States v. Doremus*, 249 U.S. 86, *Veazie Bank v. Fenno*, Wall. 533, and *Magnano Company v. Hamilton*, 292 U.S. 40, upon the other. . . .

I think it may be said that the *Doremus* case and the *McCray* case [195 U.S. 27] on the one side, and the case of *Hill v. Wallace* and the *Child Labor* case on the other, lead to the conclusion that the motives of Congress in levying a tax are not to be considered by this Court. . . .

In both the *Child Labor Tax* case and in the case of *Hill v. Wallace*, you had clear evidence of prohibitions against constitutional rights which people had and exercised. . . . You had, in the *Child Labor* case, in addition to the excessive tax, an imposition of that tax for a violation of a rule laid down. That, we think, distinguishes those cases from this one. Here is a tax which is to be used, let us say, in rental and benefit payments, . . . but there is nothing in the use for a rental or benefit payment which deprives the person who contracts with the Government of any constitutional right which he had at that time. . . .

If the Court should think it proper to go beyond the tax itself, and consider the purpose for which this money is expended, then we contend that the general welfare clause gave Congress power to expend it for rental and benefit payments.

We distinguished, of course, between the use of Federal money to coerce some action by an individual, and the inducement to the individual. We say that the general welfare clause is a clause that is construed not as a general power, but as a special power in Congress to expend this money. . . .

We accept the decision in the case of *Loan Association v. Topeka*, 20 Wall. 655, where this Court held that a State act was not for a public purpose, where it had authorized the payment to a local manufacturer of funds to operate his business. Upon the other side, the theory of public purpose upon which we rely is that enunciated in the case of *Noble State Bank v. Haskell*, 219 U. S. 104. In that case money was taken from the various state banks that were operating in the State of Oklahoma and paid into a fund which was to be used to make whole the depositors in banks that failed. That is an illustration of the use of public money for a public purpose. . . .

Extracts from the printed argument for the Government. . . .

The general welfare clause should be construed broadly to include anything conducive to the national welfare; it is not limited by the subsequently enumerated powers. Congress may tax (and appropriate) in order to promote the national welfare by means which may not be within the scope of the other Congressional powers. That this, commonly known as the Hamiltonian theory, is correct, is shown by the plain language of the clause; by the circumstances surrounding its adoption; by the opinion of most of those who participated in the early

execution of the Constitution; by the opinion of later authorities; and by long-continued practical construction. . . .

The Madisonian theory, rejecting the natural meaning, and treating the clause as an introduction to the subsequent enumeration of Congressional powers violates the basic principle of constitutional construction. . . . This would transform a great independent power into a mere incident of other powers. . . .

[There follows a heavily documented exposition of the Government's interpretation of the Hamiltonian theory.]

Oral argument of Mr. GEORGE WHARTON PEPPER, for respondents. . . .

Any such statement must, as its first point, make a reference to the declared policy of the AAA, which is found in # 2 of Title I. That policy is by an elaborate mechanism to re-create for the farmer the favorable financial conditions which, under the operation of an economic law, he for a short time enjoyed about a quarter of a century ago. . . . The base period selected as the golden age of agriculture is the pre-war period from 1909 to 1914. . . .

I pause to note that the phrase "adjustment of production to consumption" is really not an accurate statement of the objective. . . . It is evident that what is really proposed is such a reduced production as will secure for the farmer his parity price, irrespective of the effect produced upon the consumer. . . .

. . . . I desire to present two propositions for the consideration of this Court.

First: That the exactions called processing taxes are not exercises of the taxing power as such but are integral parts of a regulatory scheme and are themselves regulatory in character.

Second: That this regulatory scheme is an invasion of the field reserved by the Tenth Amendment to the States and to the people and that therefore the scheme must fall and carry the processing taxes with it. . . .

The Court will note that I am not contending that a federal loan or a federal bounty to farmers is, *per se*, invalid. . . . The type of regulation here attempted is the limitation of local agricultural production. . . .

If you look at the case realistically, it is not a voluntary matter with the farmer whether he does or does not accept the regime. . . . It is not possible for the farmer in any neighborhood who refuses to accept the regime to compete successfully with his next door neighbor who has accepted it. . . .

In connection with the emphasis laid by the Government upon the alleged voluntary character of the farmer's consent to be regulated, I think it significant to note that there is nothing voluntary in the consequences of his action as they affect the processor and the consumer. . . .

As I understand it, there are three possible views of the general welfare clause. It seems to me to be patient of two interpretations and can be tortured into a third. It is patient of the Madisonian view; it is patient of the Hamiltonian view; and it can be tortured, possibly, although I hope not, to answer the needs of the Solicitor General in the present case.

I understand Madison's view to have been that the welfare for which Congress may appropriate is the welfare which may be achieved in the exercise of the granted powers. I understand the Hamiltonian view to have been that, irrespective of the existence of power in virtue of specific grants or implications, the power to tax may be used to raise revenue for the general welfare, and that appropriations may be made out of that fund for such purposes as Congress may think fit. But I did not know, until this statute proposed it, of any interpretation which begins where Hamilton stops, and asserts that because you may appropriate for anything which Congress thinks is consonant with the public welfare, you may, through that appropriation, control the local conduct of the producer in a particular reserved to the States under the Tenth Amendment. . . .

MR. JUSTICE ROBERTS delivered the opinion of the Court.

In this case we must determine whether certain provisions of the Agricultural Adjustment Act, 1933, conflict with the Federal Constitution.

Title I of the statute is captioned "Agricultural Adjustment." Section 1 recites that an economic emergency has arisen, due to disparity between the prices of agricultural and other commodities, with consequent destruction of farmers' purchasing power and breakdown in orderly exchange, which, in turn, have affected transactions in agricultural commodities with a national public interest and burdened and obstructed the normal currents of commerce, calling for the enactment of legislation.

Section 2 declares it to be the policy of Congress:

"To establish and maintain such balance between the production and consumption of agricultural commodities, and such marketing conditions therefor, as will re-establish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to

articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period"

Section 8 provides that the Secretary of Agriculture shall have power

"(1) To provide for reduction in the acreage or reduction in the production for market, or both, of any basic agricultural commodity, through agreements with producers or by other voluntary methods, and to provide for rental or benefit payments in connection therewith to be payable out of any moneys available for such payments. . . ."

"(2) To enter into marketing agreements with processors, associations of producers, and others engaged in the handling, in the current of interstate or foreign commerce of any agricultural commodity or product thereof. . . ."

"(3) To issue licenses permitting processors to engage in the handling, in the current of interstate or foreign commerce, of any agricultural commodity or product thereof. . . ."

It will be observed that the Secretary is not required, but is permitted, if, in his uncontrolled judgment, the policy of the act will so be promoted, to make agreements with individual farmers for a reduction of acreage or production upon such terms as he may think fair and reasonable. . . .

On July 14, 1933, the Secretary of Agriculture, with the approval of the President, proclaimed that he had determined rental and benefit payments should be made with respect to cotton; that the marketing year for that commodity was to begin August 1, 1933; and calculated and fixed the rates of processing and floor taxes on cotton in accordance with the terms of the act.

The United States presented a claim to the respondents as receivers of the Hoosac Mills Corporation for processing and floor taxes on cotton. . . . The receivers recommended that the claim be disallowed. The District Court found the taxes valid and ordered them paid. Upon appeal the Circuit Court of Appeals reversed the order. . . .

First. At the outset the United States contends that the respondents have no standing to question the validity of the tax. The position is that the act is merely a revenue measure levying an excise upon the activity of processing cotton,—a proper subject for the imposition of such a tax,—the proceeds of which go into the federal treasury and thus become available for appropriation for any purpose. . . . The Government in substance and effect asks us to separate the Agricultural Adjustment Act into two statutes, the one levying an excise on processors of certain commodities, the other appropriating the public moneys independently of the first. Passing the novel suggestion that two statutes enacted as parts of a single scheme should be tested as if they were distinct and

unrelated, we think the legislation now before us is not susceptible of such separation and treatment.

The tax can only be sustained by ignoring the avowed purpose and operation of the act, and holding it a measure merely laying an excise upon processors to raise revenue for the support of government. Beyond cavil the sole object of the legislation is to restore the purchasing power of agricultural products to a parity with that prevailing in an earlier day; to take money from the processor and bestow it upon farmers who will reduce their acreage for the accomplishment of the proposed end, and, meanwhile to aid these farmers during the period required to bring the prices of their crops to the desired level.

The tax plays an indispensable part in the plan of regulation. . . . A tax automatically goes into effect for a commodity when the Secretary of Agriculture determines that rental or benefit payments are to be made for reduction of production of that commodity. The tax is to cease when rental or benefit payments cease. The rate is fixed with the purpose of bringing about crop-reduction and price-raising. It is to equal the difference between the "current average farm price" and "fair exchange value." It may be altered to such amount as will prevent accumulation of surplus stocks. If the Secretary finds the policy of the act will not be promoted by the levy of the tax for a given commodity, he may exempt it. . . . The whole revenue from the levy is appropriated in aid of crop control; none of it is made available for general governmental use. The entire agricultural adjustment program . . . is to become inoperative when, in the judgment of the President, the national economic emergency ends. . . .

The statute not only avows an aim foreign to the procurement of revenue for the support of government, but by its operation shows the exaction laid upon processors to be the necessary means for the intended control of agricultural production. . . .

It is inaccurate and misleading to speak of the exaction from processors prescribed by the challenged act as a tax, or to say that as a tax it is subject to no infirmity. A tax, in the general understanding of the term, and as used in the Constitution, signifies an exaction for the support of the Government. The word has never been thought to connote the expropriation of money from one group for the benefit of another. We may concede that the latter sort of imposition is constitutional when imposed to effectuate regulation of a matter in which both groups are interested and in respect of which there is a power of legislation. But manifestly no justification for it can be found unless as an integral part of such regulation. The exaction cannot be wrested out of its setting, denominated an excise for raising revenue and legalized by ignoring its purpose as a mere instrumentality for bringing about a desired end.

To do this would be to shut our eyes to what all others than we can see and understand. *Child Labor Tax Case*, 259 U.S. 20, 37.

We conclude that the act is one regulating agricultural production; that the tax is a mere incident of such regulation and that the respondents have standing to challenge the legality of the exaction. . . .

Second. The Government asserts that even if the respondents may question the propriety of the appropriation embodied in the statute their attack must fail because Article I, # 8 of the Constitution authorizes the contemplated expenditure of the funds raised by the tax. This contention presents the great and the controlling question in the case. We approach its decision with a sense of our grave responsibility to render judgment in accordance with the principles established for the governance of all three branches of the Government.

There should be no misunderstanding as to the function of this court in such a case. It is sometimes said that the court assumes a power to overrule or control the action of the people's representatives. This is a misconception. The Constitution is the supreme law of the land ordained and established by the people. All legislation must conform to the principles it lays down. When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate the judicial branch of the Government has only one duty,—to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and, having done that, its duty ends.

The question is not what power the Federal Government ought to have but what powers in fact have been given by the people. It hardly seems necessary to reiterate that ours is a dual form of government; that in every state there are two governments,—the state and the United States. Each State (*sic*) has all governmental powers save such as the people, by their Constitution, have conferred upon the United States, denied to the States, or reserved to themselves. The federal union is a government of delegated powers. It has only such as are expressly conferred upon it and such as are reasonably to be implied from those granted. In this respect we differ radically from nations where all legislative power, without restriction or limitation, is vested in a parliament or other legislative body subject to no restrictions except the discretion of its members.

Article I, # 8, of the Constitution vests sundry powers in the Congress. But two of its clauses have any bearing upon the validity of the statute under review.

The third clause endows the Congress with power "to regulate Commerce . . . among the several States." Despite a reference in its first section to a burden upon, and an obstruction of the normal currents of commerce, the act under review does not purport to regulate transactions in interstate or foreign commerce. Its stated purpose is the control of agricultural production, a purely local activity, in an effort to raise the prices paid the farmer. Indeed, the Government does not attempt to uphold the validity of the act on the basis of the commerce clause, which, for the purpose of the present case, may be put aside as irrelevant.

The clause thought to authorize the legislation,—the first,—confers upon the Congress power "to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States. . . ." It is not contended that this provision grants power to regulate agricultural production upon the theory that such legislation would promote the general welfare. The Government concedes that the phrase "to provide for the general welfare" qualifies the power "to lay and collect taxes." The view that the clause grants power to provide for the general welfare, independently of the taxing power, has never been authoritatively accepted. . . . The true construction undoubtedly is that the only thing granted is the power to tax for the purpose of making funds for payment of the nation's debts and making provision for the general welfare.

Nevertheless the Government asserts that warrant is found in this clause for the adoption of the Agricultural Adjustment Act. The argument is that Congress may appropriate and authorize the spending of moneys for the "general welfare"; that the phrase should be liberally construed to cover anything conducive to national welfare; that decision as to what will promote such welfare rests with Congress alone, and the courts may not review its determination; and finally that the appropriation under attack was in fact for the general welfare of the United States. The Congress is expressly empowered to lay taxes to provide for the general welfare. . . .

Since the foundation of the Nation sharp differences of opinion have persisted as to the true interpretation of the phrase. Madison asserted it amounted to no more than a reference to the other powers enumerated in the subsequent clauses of the same section; that, as the United States is a government of limited and enumerated powers, the grant of power to tax and spend for the general national welfare must be confined to the enumerated legislative fields committed to the Congress. In this view the phrase is mere tautology, for taxation and appropriation are or may be

necessary incidents to the exercise of any of the enumerated legislative powers. Hamilton, on the other hand, maintained the clause confers a power separate and distinct from those later enumerated, is not restricted in meaning by the grant of them, and Congress consequently has a substantive power to tax and to appropriate, limited only by the requirement that it shall be exercised to provide for the general welfare of the United States. Each contention has had the support of those whose views are entitled to great weight. This court has noticed the question, but has never found it necessary to decide which is the true construction. Mr. Justice Story, in his Commentaries [chap. 14, *passim*], espouses the Hamiltonian position. We shall not review the writings of public men and commentators or discuss the legislative practice. Study of all these leads us to conclude that the reading advocated by Mr. Justice Story is the correct one. While, therefore, the power to tax is not unlimited, its confines are set in the clause which confers it, and not in those of # 8 which bestow and define the legislative powers of the Congress. It results that the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution. . . .

That the qualifying phrase must be given effect all advocates of broad construction admit. Hamilton, in his well known Report on Manufactures, states that the purpose must be "general, and not local." [Works, iii. 250] Monroe, an advocate of Hamilton's doctrine, wrote, "Have Congress a right to raise and appropriate the money to any and to every purpose according to their will and pleasure? They certainly have not." [Richardson, Messages and Papers of the Presidents, ii. 167.] Story says that if the tax be not proposed for the common defence or general welfare, but for other objects wholly extraneous, it would be wholly indefensible upon constitutional principles. [*Loc. cit.* p. 673.] And he makes it clear that the powers of taxation and appropriation extend only to matters of national, as distinguished from local welfare. . . .

We are not now required to ascertain the scope of the phrase "general welfare of the United States" or to determine whether an appropriation in aid of agriculture falls within it. Wholly apart from that question, another principle embedded in our Constitution prohibits the enforcement of the Agricultural Adjustment Act. The act invades the reserved rights of the states. It is a statutory plan to regulate and control agricultural production, a matter beyond the powers delegated to the federal government. The tax, the appropriation of the funds raised, and the direction for their disbursement, are but parts of the plan. They are but means to an unconstitutional end.

From the accepted doctrine that the United States is a government of delegated powers, it follows that those not expressly granted, or reason-

ably to be implied from such as are conferred, are reserved to the states or to the people. To forestall any suggestion to the contrary, the Tenth Amendment was adopted. The same proposition, otherwise stated, is that powers not granted are prohibited. None to regulate agricultural production is given, and therefore legislation by Congress for that purpose is forbidden.

It is an established principle that the attainment of a prohibited end may not be accomplished under the pretext of the exertion of powers which are granted. . . .

The power of taxation, which is expressly granted, may, of course, be adopted as a means to carry into operation another power also expressly granted. But resort to the taxing power to effectuate an end which is not legitimate, not within the scope of the Constitution, is obviously inadmissible. . . .

Third. If the taxing power may not be used as the instrument to enforce a regulation of matters of state concern with respect to which the Congress has no authority to interfere, may it, as in the present case, be employed to raise the money necessary to purchase a compliance which the Congress is powerless to command? The Government asserts that whatever might be said against the validity of the plan if compulsory, it is constitutionally sound because the end is accomplished by voluntary coöperation. There are two sufficient answers to the contention. The regulation is not in fact voluntary. The farmer, of course, may refuse to comply, but the price of such refusal is the loss of benefits. The amount offered is intended to be sufficient to exert pressure on him to agree to the proposed regulation. The power to confer or withhold unlimited benefits is the power to coerce or destroy. If the cotton grower elects not to accept the benefits, he will receive less for his crops; those who receive payments will be able to undersell him. The result may well be financial ruin. The coercive purpose and intent of the statute is not obscured by the fact that it has not been perfectly successful. It is pointed out that, because there still remained a minority whom the rental and benefit payments were insufficient to induce to surrender their independence of action, the Congress has gone further and, in the Bankhead Cotton Act, used the taxing power in a more directly minatory fashion to compel submission. This progression only serves more fully to expose the coercive purpose of the so-called tax imposed by the present act. It is clear that the Department of Agriculture has properly described the plan as one to keep a non-coöperating minority in line. This is coercion by economic pressure. The asserted power of choice is illusory. . . .

But if the plan were one for purely voluntary coöperation it would stand no better so far as federal power is concerned. At best it is a scheme

for purchasing with federal funds submission to federal regulation of a subject reserved to the states.

It is said that Congress has the undoubted right to appropriate money to executive officers for expenditure under contracts between the government and individuals; that much of the total expenditure is so made. But appropriations and expenditures under contracts for proper governmental purposes cannot justify contracts which are not within federal power. And contracts for the reduction of acreage and the control of production are outside the range of that power. An appropriation to be expended by the United States under contracts calling for violation of a state law clearly would offend the Constitution. Is a statute less objectionable which authorizes expenditure of federal moneys to induce action in a field in which the United States has no power to intermeddle? The Congress cannot invade state jurisdiction to compel individual action; no more can it purchase such action. . . .

We are not here concerned with a conditional appropriation of money, nor with a provision that if certain conditions are not complied with the appropriation shall no longer be available. By the Agricultural Adjustment Act the amount of the tax is appropriated to be expended only in payment under contracts whereby the parties bind themselves to regulation by the Federal Government. There is an obvious difference between a statute stating the conditions upon which moneys shall be expended and one effective only upon assumption of a contractual obligation to submit to a regulation which otherwise could not be enforced. . . .

If the act before us is a proper exercise of the federal taxing power, evidently the regulation of all industry throughout the United States may be accomplished by similar exercises of the same power. It would be possible to exact money from one branch of an industry and pay it to another branch in every field of activity which lies within the province of the states. The mere threat of such a procedure might well induce the surrender of rights and the compliance with federal regulation as the price of continuance in business. . . .

We have held in *Schechter Poultry Corp. v. United States*, 295 U.S. 495, that Congress has no power to regulate wages and hours of labor in a local business. If the petitioner is right, this very end may be accomplished by appropriating money to be paid to employers from the federal treasury under contracts whereby they agree to comply with certain standards fixed by federal law or by contract. . . .

Hamilton himself, the leading advocate of broad interpretation of the power to tax and to appropriate for the general welfare, never suggested that any power granted by the Constitution could be used for the destruction of local self-government in the states. Story countenances no

such doctrine. It seems never to have occurred to them, that the general welfare of the United States, (which has aptly been termed "an indestructible Union, composed of indestructible States,") might be served by obliterating the constituent members of the Union. But to this fatal conclusion the doctrine contended for would inevitably lead. . . .

MR. JUSTICE STONE, dissenting. . . .

1. The power of courts to declare a statute unconstitutional is subject to two guiding principles of decision which ought never to be absent from judicial consciousness. One is that courts are concerned only with the power to enact statutes, not with their wisdom. The other is that while unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our own exercise of power is our own sense of self-restraint. For the removal of unwise laws from the statute books appeal lies not to the courts but to the ballot and to the processes of democratic government.

2. The constitutional power of Congress to levy an excise tax upon the processing of agricultural products is not questioned. The present levy is held invalid, not for any want of power in Congress to lay such a tax to defray public expenditures, including those for the general welfare, but because the use to which its proceeds are put is disapproved.

3. As the present depressed state of agriculture is nation wide in its extent and effects, there is no basis for saying that the expenditure of public money in aid of farmers is not within the specifically granted power of Congress to levy taxes to "provide for the . . . general welfare." The opinion of the Court does not declare otherwise.

4. No question of a variable tax fixed from time to time by fiat of the Secretary of Agriculture, or of unauthorized delegation of legislative power, is now presented. The schedule of rates imposed by the Secretary in accordance with the original command of Congress has since been specifically adopted and confirmed by Act of Congress. . . . Any defects there may have been in the manner of laying the tax by the Secretary have now been removed by the exercise of the power of Congress to pass a curative statute validating an intended, though defective, tax. . . .

It is with these preliminary and hardly controverted matters in mind that we should direct our attention to the pivot on which the decision of the Court is made to turn. It is that a levy unquestionably within the taxing power of Congress may be treated as invalid because it is a step in a plan to regulate agricultural production and is thus a forbidden infringement of the state power. . . . The tax is unlike the penalties which were held invalid in the *Child Labor Tax Case*, 259 U.S. 20, in

Hill v. Wallace, 259 U.S. 44, . . . because they were themselves the instruments of regulation by virtue of their coercive effect on matters left to the control of the states. Here regulation, if any there be, is accomplished not by the tax but by the method by which its proceeds are expended, and would equally be accomplished by any like use of public funds, regardless of their source. . . .

Of the assertion that the payments to farmers are coercive, it is enough to say that no such contention is pressed by the taxpayer, and no such consequences were to be anticipated or appear to have resulted from the administration of the Act. The suggestion of coercion finds no support in the record or in any data showing the actual operation of the Act. . . .

It is upon the contention that state power is infringed by purchased regulation of agricultural production that chief reliance is placed. . . .

The Constitution requires that public funds shall be spent for a defined purpose, the promotion of the general welfare. Their expenditure usually involves payment on terms which will insure use by the selected recipients within the limits of the constitutional purpose. Expenditures would fail of their purpose and thus lose their constitutional sanction if the terms of payment were not such that by their influence on the action of the recipients the permitted end would be attained. The power of Congress to spend is inseparable from persuasion to action over which Congress has no legislative control. Congress may not command that the science of agriculture be taught in state universities. But if it would aid the teaching of that science by grants to state institutions, it is appropriate, if not necessary, that the grant be on the condition . . . that it be used for the intended purpose. . . . It makes no difference that there is a promise to do an act which the condition is calculated to induce. . . .

Congress through the Interstate Commerce Commission has set aside intrastate railroad rates. It has made and destroyed intrastate industries by raising or lowering tariffs. These results are said to be permissible because they are incidents of the commerce power and the power to levy duties on imports. . . . The only conclusion to be drawn is that results become lawful when they are incidents of those powers but unlawful when incident to the similarly granted power to tax and spend.

Such a limitation is contradictory and destructive of the power to appropriate for the public welfare, and is incapable of practical application. The spending power of Congress is in addition to the legislative power and not subordinate to it. . . . It is a contradiction in terms to say that there is power to spend for the national welfare, while rejecting any power to impose conditions reasonably adapted to the attainment of the end which alone would justify the expenditure. . . .

That the governmental power of the purse is a great one is not now for the first time announced. Every student of the history of government and economics is aware of its magnitude and of its existence in every civilized government. Both were well understood by the framers of the Constitution when they sanctioned the grant of the spending power to the federal government, and both were recognized by Hamilton and Story, whose views of the spending power as standing on a parity with the other powers specifically granted, have hitherto been generally accepted.

The suggestion that it must now be curtailed by judicial fiat because it may be abused by unwise use hardly rises to the dignity of argument. So may judicial power be abused. . . .

A tortured construction of the Constitution is not to be justified by recourse to extreme examples of reckless congressional spending which might occur if courts could not prevent—expenditures which, even if they could be thought to effect any national purpose, would be possible only by action of a legislature lost to all sense of public responsibility. Such suppositions are addressed to the mind accustomed to believe that it is the business of courts to sit in judgment on the wisdom of legislative action. Courts are not the only agency of government that must be assumed to have capacity to govern. . . . But interpretation of our great charter of government which proceeds on any assumption that the responsibility for the preservation of our institutions is the exclusive concern of any one of the three branches of government, or that it alone can save them from destruction is far more likely, in the long run, “to obliterate the constituent members” of “an indestructible union of indestructible states” than the frank recognition that language, even of a constitution, may mean what it says: that the power to tax and spend includes the power to relieve a nation-wide economic maladjustment by conditional gifts of money.

MR. JUSTICE BRANDEIS and MR. JUSTICE CARDOZO join in this dissent.

HELVERING v. DAVIS.

Supreme Court of the United States. 1937.
301 U.S. 619.

MR. JUSTICE CARDOZO delivered the opinion of the Court.

The Social Security Act . . . is challenged once again.

In *Steward Machine Co. v. Davis*, decided this day, *ante*, p. 548, we have upheld the validity of Title IX of the act, imposing an excise upon

employers of eight or more. In this case Titles VIII and II are the subject of attack. Title VIII lays another excise upon employers in addition to the one imposed by Title IX. . . . It lays a special income tax upon employees to be deducted from their wages and paid by the employers. Title II provides for the payment of Old Age Benefits, and supplies the motive and occasion, in the view of the assailants of the statute, for the levy of the taxes imposed by Title VIII. The plan of the two titles will now be summarized more fully.

Title VIII, as we have said, lays two different types of tax, an "income tax on employees," and "an excise tax on employers." The income tax on employees is measured by wages paid during the calendar year. . . . The excise tax on the employer is to be paid "with respect to having individuals in his employ," and, like the tax on employees, is measured by wages. . . . The two taxes are at the same rate. . . . In the computation of wages all remuneration is to be included except so much as is in excess of \$3000 during the calendar year affected. . . . The proceeds of both taxes are to be paid into the Treasury like internal-revenue taxes generally, and are not earmarked in any way. . . .

Title II has the caption "Federal Old-Age Benefits." The benefits are of two types, first, monthly pensions, and second, lump sum payments, the payments of the second class being relatively few and unimportant.

The first section of this title creates an account in the United States Treasury to be known as the "Old-Age Reserve Account." No present appropriation, however, is made to that account. . . .

Section 202 and later sections prescribe the form of benefits. The principal type is a monthly pension payable to a person after he has attained the age of 65. . . . In no event are they to exceed \$85 a month. . . .

This suit is brought by a shareholder of the Edison Electric Illuminating Company of Boston, a Massachusetts corporation, to restrain the corporation from making the payments and deductions called for by the act, which is stated to be void under the Constitution of the United States. . . .

* * * * *

Second. The scheme of benefits created by the provisions of Title II is not in contravention of the limitations of the Tenth Amendment.

Congress may spend money in aid of the "general welfare." . . . There have been great statesmen in our history who have stood for other views. We will not resurrect the contest. It is now settled by decision. [*United States v. Butler*, 297 U.S. 1]. The conception of the spending power advocated by Hamilton and strongly reinforced by Story has prevailed over that of Madison, which has not been lacking

in adherents. Yet difficulties are left when the power is conceded. The line must still be drawn between one welfare and another, between particular and general. Where this shall be placed cannot be known through a formula in advance of the event. There is a middle ground or certainly a penumbra in which discretion is at large. The discretion, however, is not confided to the courts. The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment. This is now familiar law. "When such a contention comes here we naturally require a showing that by no reasonable possibility can the challenged legislation fall within the wide range of discretion permitted to the Congress" *United States v. Butler, supra*, p. 67. . . . Nor is the concept of the general welfare static. Needs that were narrow or parochial a century ago may be interwoven in our day with the well-being of the Nation. What is critical or urgent changes with the times.

The purge of nation-wide calamity that began in 1929 has taught us many lessons. Not the least is the solidarity of interests that may once have seemed to be divided. Unemployment spreads from State to State, the hinterland now settled that in pioneer days gave an avenue of escape. . . . Spreading from State to State, unemployment is an ill not particular but general, which may be checked, if Congress so determines, by the resources of the Nation. . . . But the ill is all one, or at least not greatly different, whether men are thrown out of work because there is no longer work to do or because the disabilities of age make them incapable of doing it. Rescue becomes necessary irrespective of the cause. The hope behind this statute is to save men and women from the rigors of the poor house as well as from the haunting fear that such a lot awaits them when journey's end is near.

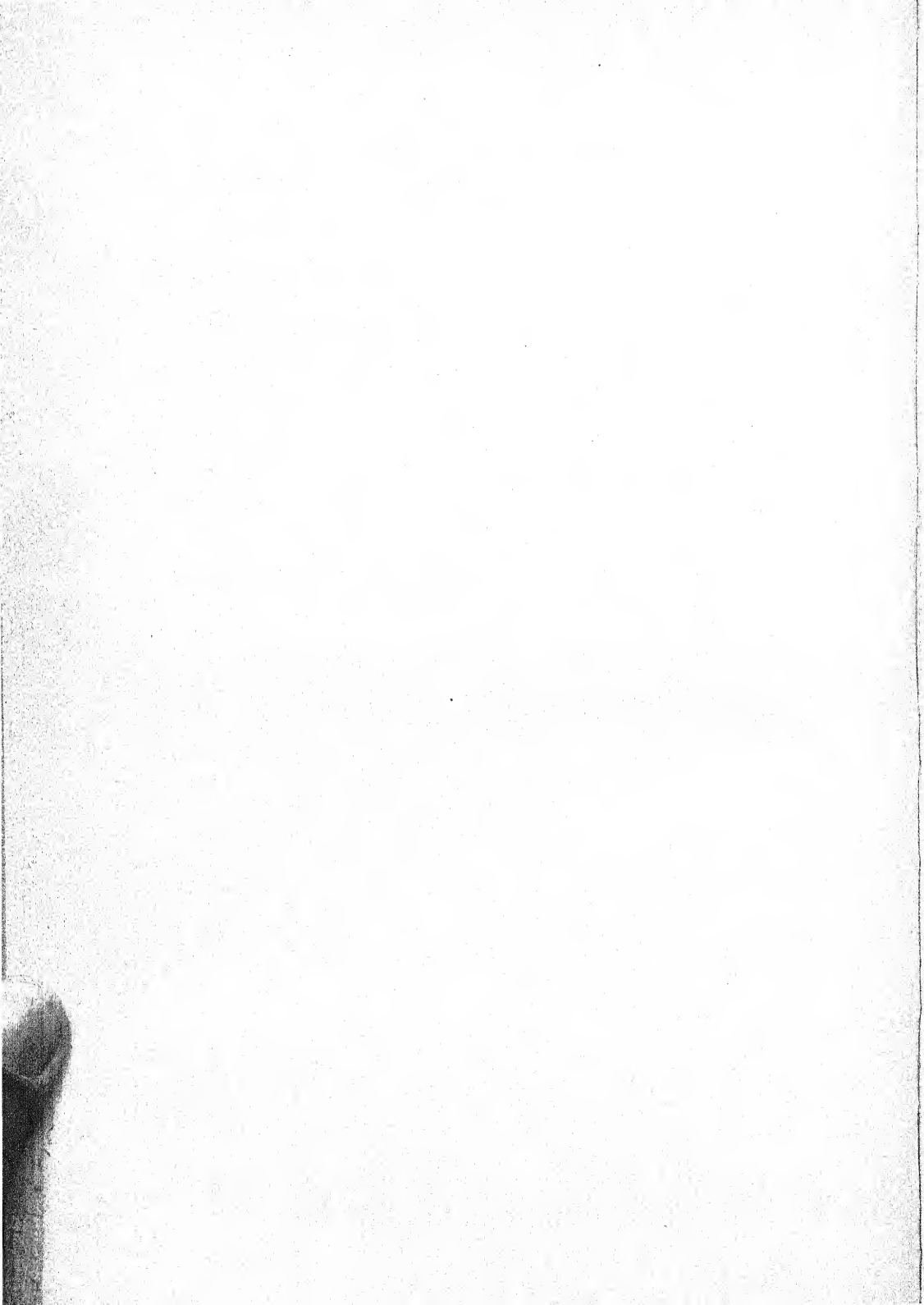
Congress did not improvise a judgment when it found that the award of old age benefits would be conducive to the general welfare. . . . A great mass of evidence was brought together supporting the policy which finds expression in the act. Among the relevant facts are these: The number of persons in the United States 65 years of age or over is increasing proportionately as well as absolutely. What is even more important the number of such persons unable to take care of themselves is growing at a threatening pace. More and more our population is becoming urban and industrial instead of rural and agricultural. The evidence is impressive that among industrial workers the younger men and women are preferred over the older. In times of retrenchment the older are commonly the first to go, and even if retained, their wages are likely to be lowered. The plight of men and women at so low an age as 40 is hard, almost hopeless, when they are driven to seek for reemployment. Statistics are in the brief. . . .

The problem is plainly national in area and dimensions. Moreover, laws of the separate states cannot deal with it effectively. Congress, at least, had a basis for that belief. States and local governments are often lacking in the resources that are necessary to finance an adequate program of security for the aged. . . . Apart from the failure of resources, states and local governments are at times reluctant to increase so heavily the burden of taxation to be borne by their residents for fear of placing themselves in a position of economic disadvantage as compared with neighbors or competitors. . . . A system of old age pensions has special dangers of its own, if put in force in one state and rejected in another. The existence of such a system is a bait to the needy and dependent elsewhere, encouraging them to migrate and seek a haven of repose. Only a power that is national can serve the interests of all.

Whether wisdom or unwisdom resides in the scheme of benefits in Title II, it is not for us to say. . . . Counsel for respondent has recalled to us the virtues of self-reliance and frugality. . . . But the answer is not doubtful. . . . The issue is a closed one. It was fought out long ago. When money is spent to promote the general welfare, the concept of welfare or the opposite is shaped by Congress, not the states. So the concept be not arbitrary, the locality must yield. Constitution, Art. VI, Par. 2.

* * * * *

MR. JUSTICE McREYNOLDS and MR. JUSTICE BUTLER [dissented.]



PART IV

The Interstate Commerce Clause

CHAPTER VIII

The Power to Regulate Interstate Commerce

THE FOUNDATION OF THE NATIONAL POWER

When the Constitution was ratified, "commerce" seems to have been understood simply as trade; the meaning of the word was thought to be self-evident. The evils which provoked the transfer of control over commerce from the several states to the general government were principally of two kinds: obstruction to trade, and diversity, which became discrimination, of regulation. The framers wished to make impossible the tariff barriers which the northern and middle states were using to implement their economic rivalries. They thought it necessary, further, to take from the states their power to impose discriminatory fees and licenses on "foreign" importers and on "foreign" products. They certainly knew that the establishment of a sound commercial system would be impossible of attainment unless the central government were given ample control over the currency, but they could hardly include money within the conception of commerce; it must be conveyed by a separate grant. Besides these elementary considerations, it would seem reasonable to suppose that the framers appreciated the importance of preventing the states from interfering with the passage of commodities, and with the course of trade, across the frontiers of the states, so that transportation, at least as an accessory to commerce, must be within the federal jurisdiction where it should be interstate.

The Supreme Court began its work on the commerce clause with *Gibbons v. Ogden*, 9 Wheat. 1, decided in 1824. Until Chief Justice Marshall spoke for the Court in that case, it had been thought that the legal forms for the judicial settlement of problems arising under the commerce clause were simple. It had been taken for granted that the distinction between intra- and interstate commerce was apparent to everyone. The state was thought to be the prime regulator of business, the commerce clause being regarded as of a negative effect in that it freed business from local fetters where that business was spread over more than a local district.

The immediate effect of *Gibbons v. Ogden* was to break a state monopoly of transportation facilities by making a federal license to navigate steam vessels within a state jurisdiction where one terminal is

without the state, a constitutional exercise of the power to regulate interstate commerce. Marshall used the odd word, "intercourse," to describe commerce in order to include transportation, which counsel for the state were attempting to exclude. But there was much that was latent in the language of the Chief Justice, so that the opinion soon became a reservoir of power for the federal government. He asserted the doctrine of national supremacy unequivocally where a direct conflict between state and national legislation takes place. The outlines of a parallel doctrine of exclusive power were shadowed, but were left indistinct by the acknowledgment that a concurrent power over commerce exists in the states. These intimations of an exclusive federal power have never been clarified beyond dispute. The doctrine seems to have developed into one of inviolability, and to have been converted into a limitation of state power over a large field.

From 1824 to 1851, the year of *Cooley v. Board of Port Wardens*, 12 How. 299, the justices differed openly and profoundly in their conceptions of the nature of the grant of power made to Congress through the interstate commerce clause, and the issue around which these differences crystalized was the concurrent power over commerce possessed by the states. In 1827 the Chief Justice handed down another opinion construing the commerce clause, in the case of *Brown v. Maryland*, 12 Wheat. 419; and again, one more in *Wilson v. Blackbird Creek Marsh Co.*, 2 Pet. 245 (1829). This was his last on the commerce clause. Marshall's conception of the reach of the commerce power is contained in these three cases; but succeeding justices have never been able to agree as to what it was. The controlling principle of the *Gibbons* case is, that the federal power over commerce is plenary and supreme within the field of its operation. *Brown v. Maryland* has been cited frequently by the proponents of the doctrine of exclusiveness, although the Chief Justice stated in the course of his opinion that that question did not arise for determination. In the *Blackbird Creek* case, the opportunity to apply the doctrine was clearly presented, but was not taken. Delaware had authorized the construction of a dam across a creek. Defendants, sailing a vessel under federal license, broke through the dam willfully, and were thereupon sued for damages. The Chief Justice closes his opinion with this ruling: "We do not think that the act empowering the Blackbird Creek Marsh Company to place a dam across the creek, can, under all the circumstances of the case, be considered as repugnant to the power to regulate commerce in its dormant state, or as being in conflict with any law passed on the subject."

Yet, to the end, Mr. Justice Story maintained that Chief Justice Marshall had asserted that the federal power over interstate commerce is exclusive: "It has been argued that the power of Congress to regulate

commerce is not exclusive, but concurrent with that of the states. If this were a new question in this court, wholly untouched by doctrine or decision, I should not hesitate to go into a full examination of all the grounds upon which concurrent authority is attempted to be maintained. But in point of fact, the whole argument on this very question, as presented by the learned counsel on the present occasion, was presented by the learned counsel who argued the case of *Gibbons v. Ogden*, 9 Wheat. 1; and it was then deliberately examined and deemed inadmissible by the court. Mr. Chief Justice Marshall, with his accustomed accuracy and fulness of illustration, reviewed at the time the whole grounds of the controversy; and from that time to the present, the question has been considered (as far as I know) to be at rest. The power given to Congress to regulate commerce with foreign nations, and among the states, has been deemed exclusive, from the nature and objects of the power, and the necessary implications growing out of its exercise. . . ." *New York v. Miln*, 11 Pet. 102, 153 (1837), at page 155 (dissent).

The issue, of course, was fundamental: it was that of nationalism against the particularism of the states. The whole question was re-examined in the *License Cases*, 5 How. 504 (1847). The laws of three states were involved. They had in common a requirement of a license from the state for the sale of liquor. Considerable heat was generated by the justices and radiated in their opinions. The issue separating them was whether the act requiring such a license was a regulation of interstate commerce. An affirmative answer, however, required a discussion of the extent of the power of a state over commerce within its borders. It was possible to avoid the whole problem by lodging such a regulation in the police power of the state. Or, it was possible to hold that the (acknowledged) federal jurisdiction barred state legislation on the subject. Or, again, it was tenable that the concurrent power of the states over commerce covered the legislation before the Court. At one point there was no disagreement among the justices: if the state act, whether it were police or a regulation of commerce, collided with an act of Congress, then the state act must yield. But if Congress were silent? In the words of the *Blackbird Creek* case, If the commerce power were dormant? Was the state then still inhibited from acting? The cases answered that such a law was constitutional, and the Court so held. The decision was apparently unanimous, but it was reached by different processes of reasoning. The Court contained (1) those who rested their opinion on the possession by the state of a concurrent power to regulate commerce; (2) those who held that the grant to Congress was exclusive, but that in the present instance the state had exerted its police power; (3) those who held also that the act was a police provision, but thought, further, that it would have been equally valid as an exercise of the commerce

power; and (4) those who held that the act was a regulation of intrastate commerce and so outside the controversy over the power delegated to Congress. The Court was thus roughly divided between those who thought that a state might lay an incidental burden upon interstate commerce, and those who thought it might not. But much agreement was also embedded within this difference, for it was possible that both groups could unite on another occasion to hold up the commerce clause as a barrier to the exercise of the police power of the states. They could do so simply by holding that the burden laid was not incidental, but direct.

Mr. Justice Woodbury offered a formula which he begged his brethren to accept: "[T]here is much in connection with foreign commerce which is local within each State, convenient for its regulation and useful to the public, to be acted on by each till the power is abused or some course is taken by congress conflicting with it. . . .

"This local, territorial, and detailed legislation should vary in different States, and it is better understood by each than by the general government . . . so here the States, not conflicting with any uniform and general regulations by congress as to foreign commerce, must for convenience, if not necessity, from the very nature of the power, not be debarred from any legislation of a local and detailed character on matters connected with that commerce omitted by congress. And to hold the power of congress as to such topics exclusive, in every respect, and prohibitory to the States, though never exercised by congress, as fully as when in active operation, which is the opposite theory, would create infinite inconvenience, and detract much from the cordial coöperation and consequent harmony between both governments, in their appropriate spheres. It would nullify numerous useful laws and regulations in all the Atlantic and commercial States in the Union.

"If this view of the subject conflicts with opinions laid down *obiter* in some of the decisions made by this court; 9 Wheat. 20; 12 *ibid.* 438; 16 Pet. 543, it corresponds with the conclusions of several judges on this point, and does not, in my understanding of the subject, contradict any adjudged case in point. 5 Wheat. 49; *Wilson v. Blackbird Creek Marsh Company*, 2 Pet. 245; 11 *ibid.* 132; 14 *ibid.* 579; 16 *ibid.* 627, 664; 4 Wheat. 196."

The battle was fought out in the *Passenger Cases*, 7 How. 285 (1848). It is agreed that the opinions handed down therein are the best discussion of the concurrent power over commerce which the cases afford. Then followed the *Cooley Case*, 12 How. 299 (1851), in which the Supreme Court formally adopted Woodbury's argument. The rule laid down there is now firmly embedded among the decisions.

In this line of cases the Supreme Court had at last reached a definite policy regarding a problem which is inherent in the American constitu-

tional system. By means of the formula adopted in the *Cooley Case*, it announced, in effect, that it would preserve for the states their power to protect the health and safety of their citizens, but that it would prevent the placing of practical obstructions in the channels of interstate commerce where such obstructions resulted from the exercise of that power. And, at the same time, the Court limited the taxing power of the state at the same point. Since that decision, the Court has consistently reserved for itself the right to judge independently of the legislature of the immediacy or gravity of the danger against which protection has been given, as well as when the state has entered the stream of commerce, and its policy has not been consistent, *Minnesota v. Barber*, 136 U.S. 313 (1890); *Sligh v. Kirkwood*, 237 U.S. 52 (1915); *Ohio v. West Virginia*, 262 U.S. 553 (1923); *Atlantic Coast Line R. R. Co. v. Georgia*, 234 U.S. 280 (1914). Like limitations apply to the use of the states' taxing power. But here the Court has had rather more definite standards at its disposal by which to test the nature and extent of the obstruction laid, and has been able to use its own definitions of commerce with consistent effect.

This venture into the qualitative was rendered inevitable by the necessity before the Court of developing the conceptual definition of commerce given by Chief Justice Marshall in the *Gibbons Case*. Practical relationships between the concurrent powers had to be worked out through the adjudication of specific cases. When commerce becomes interstate, and when it ceases to be interstate, had to be marked precisely before it could be decided whether or not a conflict between the powers was present, or whether state power had entered a sphere in which the federal power was supreme and plenary. Furthermore, and quite apart from the rule laid down in the *Cooley Case*, the Court was compelled by the nature of its task to conclude for itself whether a given regulation of interstate commerce, made in the exercise of a reserved power by a state, so interfered with that commerce as to constitute an infringement of the power granted to Congress. It is not too much to say that for the first hundred years the commerce clause received its construction by matching against it state legislation.

The period of railroad expansion after the Civil War gave rise to the second great series of cases turning on the extent of state power in this field. Historically, the rate-making power is a specific exertion of the reserved power over local commerce. Statutory fixation of rates, however, was motivated by an intention to protect the public from extortionate charges, and this purpose was a commonly accepted police objective. It became possible, as Chief Justice Taney had shown in the *License Cases*, and as the opinions of the Court in the *Passenger Cases* illustrate, for a state to achieve a purpose admitted to be within the range of the police power, by exerting its commerce power. After *Munn v. Illinois*

the function of rate-making was lodged as firmly in the police power as it was ever to be. This case was not, of course, concerned with charges made by common carriers. But in the *Railroad Commission Cases*, 116 U.S. 307 (1886), the Court sustained such a state law by upholding the fullness of power over intrastate commerce, at the same time that it grounded the decision on the power of the state to protect its citizens from exorbitant charges by the carriers for their services.

This power to regulate intrastate rates was bound to affect, eventually, the rates charged for interstate transportation. This point was reached in the history of the decisions with the *Shreveport Case*, 234 U.S. 342 (1914). From a political point of view, the Court was faced squarely with the choice of either frustrating or developing a national system of railroads. It chose the latter, and abandoned a doctrine which it had been applying since the days of Chief Justice Taney. The result of that decision was to overthrow state laws of more than thirty years' standing. It inaugurated a period of more than twenty years during which the interstate commerce power was applied by the courts to restrict the scope of the police power of the states.

A consequence of the decision in the *Railroad Commission Cases* was another line of cases of closely related import. It was only four years thereafter that the Court handed down its decision in *Chicago, M. & St. P. Ry. Co. v. Minnesota*. It will be recalled that the Court held that the question of the reasonableness of the rates fixed is eminently one fitted for judicial inquiry. It found the state law bad because there was no provision in it allowing the affected companies the "right" of judicial investigation. Thus in the brief time between the two cases the Supreme Court felt itself compelled to curb the power which it had so amply supported. That the Court meant the curb to be something more than substantial due process was made clear in the next case in this series, that of *Smyth v. Ames*, 169 U.S. 466 (1898). As a part of its decision, the Court laid down certain specifications which must form the "basis of all calculations as to the reasonableness of rates." This part of the opinion is the well-known "rule" of *Smyth v. Ames*. By this assumed right to subject a rate-level to its scrutiny, the Court was now enabled to place rates within the police power and then to block them by invoking due process, or to void them as a direct regulation of interstate commerce. The former tactic was used in the *Minnesota Rate Cases*; the latter, in the *Shreveport Case* the next year.

The opinion of Mr. Justice Hughes in the former case, 230 U.S. 352 (1913), besides being the best judicial discussion of the commerce power, is a particularly interesting example of the statecraft of the Supreme Court. His repeated notice of the intricacy of the blend of intrastate and interstate business and of the difficulty of their separation; and his

emphatic reiteration of the plenary power enjoyed by Congress over interstate commerce, together formed an invitation to the federal government to assume jurisdiction over the whole subject of rate-making. Congress responded with the Transportation Act of 1920. The Court upheld it in *Wisconsin v. C., B. & Q. Ry. Co.*, 257 U.S. 563 (1922).

A third great line of decisions has arisen from the efforts of the federal government to prohibit combinations of business in restraint of trade. The resistance of private business to this policy created as great a constitutional controversy as any for which the Supreme Court has been the arena. Those cases which develop the judicial theory of the control of monopolies will be given in the next chapter. The cases in which the Court expanded the commerce clause to support governmental policy are given in the present chapter. This division is made because the doctrine of the latter cases was used not only in the field of monopolies, but also in the whole field of the governmental regulation of interstate business.

The Supreme Court met at the outset the litigation growing out of the passage of the Sherman Anti-Trust Act of 1890 with a stock of theories which had been the outgrowth of the pressure of state power on interstate concerns. These theories were grouped around a concept of commerce which was, fundamentally and characteristically, transportation. This point of view is revealed by the reliance which the Court habitually placed upon such figures of speech as "the flow of commerce"; the "current" or "stream" of commerce; the "channels" of commerce. The words "obstruction" and "burden" to denote state regulation of business activity are clearly conceptual and figurative.

It is not necessary to assume that the Supreme Court was swayed by the ideology of Big Business when it flattened out the Sherman Anti-Trust Act with the *E. C. Knight* decision. The Court was confronted in that case with a new use of the commerce power. It met the situation with the doctrines that it knew, and which had been sifted and tested time out of mind. In cutting between manufacture and commerce, the Court was making a logical application of the doctrine of the movement of commerce. Ten years after *United States v. E. C. Knight Co.*, the federal government sought before the Supreme Court the dissolution of a combination of meat packers. The primary allegation made by the government against them was that they had conspired to manipulate the markets so as to fix the prices at which the cattle men should sell their stock. The activating element in the combination was not the control of transportation or the current of commerce, but the control of sales. Speaking through Mr. Justice Holmes, the Court met this problem with the announcement of a new principle which was to revolutionize the judicial conception of the commerce power: "Commerce among the

States is not a technical legal conception, but a practical one, drawn from the course of business." This is the case of *Swift & Co. v. United States*, 196 U.S. 375 (1905). The principle was reaffirmed and applied as a milestone in the development of the commerce clause in *Stafford v. Wallace*, 258 U.S. 495, seventeen years later.

BIBLIOGRAPHICAL NOTE

There is but little of general value on the commerce clause. The best short study of the early development of the clause is Felix Frankfurter, *The Commerce Clause under Marshall, Taney and Waite* (Chapel Hill, 1937).

On the subject-matter of the present chapter, the best articles are Edward S. Corwin, "The Anti-Trust Acts and the Constitution," 18 *Va. Law Rev.* 355 (1932) and, by the same author, "Congress's Power to Prohibit Commerce—A Crucial Constitutional Issue," 18 *Corn. Law Quar.* 477 (1933).

What is Commerce?

GIBBONS v. OGDEN.

Supreme Court of the United States, 1824.
9 Wheaton, 1.

[Error to the court for the trial of impeachments and correction of errors of the State of New York. The legislature of New York had granted to Robert R. Livingston and Robert Fulton the exclusive right of navigation of all waters within the jurisdiction of the State with steam vessels for a term of years yet unexpired. Livingston and Fulton assigned to John R. Livingston, and he in turn assigned to Ogden, who was the plaintiff below, the right to ply vessels between New York City and certain terminals in New Jersey, including Elizabethtown. Gibbons, the defendant below, ran two steamboats, the *Stoudinger* and the *Bellona*, between the city of New York and Elizabethtown, under a federal license to engage in the coasting trade by virtue of the Act of Congress of February 18, 1793 (1 Stat. at Large, 305). Ogden secured an injunction to restrain Gibbons from operating any steam vessels within the waters of New York, on the ground that such operation infringed the exclusive privilege conferred on him, and the decree was made perpetual.]

MARSHALL, C. J., delivered the opinion of the court.

The appellant contends that this decree is erroneous, because the laws which purport to give the exclusive privilege it sustains, are repugnant to the constitution and laws of the United States.

They are said to be repugnant—

1. To that clause in the constitution which authorizes congress to regulate commerce.
2. To that which authorizes congress to promote the progress of science and the useful arts.

.

This instrument contains an enumeration of powers expressly granted by the people to their government. It has been said that these powers ought to be construed strictly. But why ought they be so construed? Is there one sentence in the constitution which gives countenance to thus rule? In the last of the enumerated powers, that which grants, expressly, the means of carrying all others into execution, congress is authorized "to make all laws which shall be necessary and proper" for the purpose. But this limitation on the means which may be used, is not extended to the powers which are conferred; nor is there one sentence in the constitution that prescribes this rule. We do not, therefore, think ourselves justified in adopting it. . . . We know of no rule for construing the extent of such powers, other than is given by the language of the instrument which confers them, taken in connection with the purposes for which they are conferred.

The words are: "Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

The subject to be regulated is commerce; and our constitution being, as was aptly said at the bar, one of enumeration, and not of definition, to ascertain the extent of the power, it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. . . . Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse. . . .

If commerce does not include navigation, the government of the United States has no direct power over that subject. . . . Yet this power has been exercised from the commencement of the government, has been exercised with the consent of all, and has been understood by all to be a commercial regulation. All America understands, and has uniformly understood, the word, "commerce," to comprehend navigation. . . . The power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government, and must have been contemplated in forming it. The con-

vention must have used the word in that sense, because all have understood it in that sense; and the attempt to restrict it comes too late. . . .

To what commerce does this power extend?

It has, we believe, been universally admitted that these words comprehend every species of commercial intercourse between the United States and foreign nations. No sort of trade can be carried on between this country and any other, to which this power does not extend. It has been truly said that commerce, as the word is used in the constitution, is a unit, every part of which is indicated by the term.

If this be the admitted meaning of the word, in its application to foreign nations, it must carry the same meaning throughout the sentence, and remain a unit, unless there be some plain intelligible cause which alters it.

The subject to which the power is next applied, is to commerce "among the several States."

It is not intended to say that these words comprehend that commerce which is completely internal and which does not extend to or affect other States. The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. . . .

But, in regulating commerce with foreign nations, the power of congress does not stop at the jurisdictional lines of the several States. If congress has the power to regulate it, that power must be exercised whenever the subject exists. If it exists within the States, if a foreign voyage may commence or terminate at a port within a State, then the power of congress may be exercised within a State.

This principle is, if possible, still more clear when applied to commerce "among the several States." What is commerce "among" them; and how is it to be conducted? Can a trading expedition between two adjoining States, commence and terminate outside of each? And if the trading intercourse be between two States remote from each other, must it not commence in one, terminate in the other, and probably pass through a third? The power of congress, then, whatever it may be, must be exercised within the territorial jurisdiction of the several States. . . .

We are now arrived at the inquiry—what is this power?

It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in congress, is complete in itself, may be exercised to its utmost extent, and

acknowledges no limitations other than are prescribed in the constitution. . . .

But it has been urged with great earnestness that, although the power of congress to regulate commerce be coextensive with the subject itself, yet the States may severally exercise the same power, within their respective jurisdictions. . . .

The grant of the power to lay and collect taxes is, like the power to regulate commerce, made in general terms, and has never been understood to interfere with the exercise of the same power by the States. . . . But the two grants are not, it is conceived, similar in their terms or their nature. . . . Taxation is the simple operation of taking small portions from a perpetually accumulating mass, susceptible of almost infinite division; and a power in one to take what is necessary for certain purposes, is not, in its nature, incompatible with a power in another to take what is necessary for other purposes. . . . In imposing taxes for State purposes, they are not doing what congress is empowered to do. Congress is not empowered to tax for those purposes which are within the exclusive province of the States. When, then, each government exercises the power of taxation, neither is exercising the power of the other.

But, when a State proceeds to regulate commerce with foreign nations, or among the several States, it is exercising the very power that is granted to congress, and is doing the very thing which congress is authorized to do. . . .

But the inspection laws are said to be regulations of commerce, and are certainly recognized in the constitution as being passed in the exercise of a power remaining with the States.

That inspection laws may have a remote and considerable influence on commerce will not be denied; but that a power to regulate commerce is the source from which the right to pass them is derived, cannot be admitted. . . . They act upon the subject before it becomes an article of foreign commerce, or of commerce among the States, and prepare it for that purpose. They form a portion of that immense mass of legislation, which embraces every thing within the territory of a State, not surrendered to a general government. . . . Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, &c., are component parts of this mass.

No direct general power over these objects is granted to congress and, consequently, they remain subject to state legislation. If the legislative power of the Union can reach them, it must be for national purposes; it must be where the power is expressly given for a special purpose, or is clearly incidental to some power which is expressly

given. It is obvious that the government of the Union, in the exercise of its express powers, that, for example, of regulating commerce with foreign nations and among the States, may use means that may also be employed by a State, in the exercise of its acknowledged powers; that, for example, of regulating commerce within the State. . . . So if a State, in passing laws on subjects acknowledged to be within its control, and with a view to those subjects, shall adopt a measure of the same character with one which congress may adopt, it does not derive its authority from the particular power which has been granted, but from some other which remains with the State, and may be executed by the same means. All experience shows that the same measures, or measures scarcely distinguishable from each other, may flow from distinct powers; but this does not prove that the powers themselves are identical. . . .

In our complex system, presenting the rare and difficult scheme of one general government, whose action extends over the whole, but which possesses only certain enumerated powers; and of numerous state governments, which retain and exercise all powers not delegated to the union, contests respecting power must arise. . . .

The acts of congress, passed in 1796, and 1799 (1 Stats. at Large, 474, 619), empowering and directing the officers of the general government to conform to, and assist in the execution of the quarantine and health laws of a State, proceed, it is said, upon the idea that these laws are constitutional. It is undoubtedly true that they do proceed upon that idea; and the constitutionality of such laws has never, so far as we are informed, been denied. But they do not imply an acknowledgment that a State may rightfully regulate commerce with foreign nations, or among the States; for they do not imply that such laws are an exercise of that power, or enacted with a view to it. On the contrary, they are treated as quarantine and health laws, are so denominated in the acts of congress, and are considered as flowing from the acknowledged power of a State, to provide for the health of its citizens. . . . But in making these provisions the opinion is unequivocally manifested, that congress may control the state laws, so far as it may be necessary to control them, for the regulation of commerce. . . .

It has been said that the act of August 7, 1789 (1 Stats. at Large, 54), acknowledges a concurrent power in the States to regulate the conduct of pilots, and hence is inferred an admission of their concurrent right with congress to regulate commerce with foreign nations, and amongst the States. But this inference is not, we think, justified by the fact.

Although congress cannot enable a State to legislate, congress may adopt the provisions of a State on any subject. . . .

The act unquestionably manifests an intention to leave this subject entirely to the States, until congress shall think proper to interpose. . . . The acknowledged power of a State to regulate its police, its domestic trade, and to govern its own citizens, may enable it to legislate on this subject, to a considerable extent; and the adoption of its system by congress . . . does not seem to the court to imply a right in the States so to apply it of their own authority. . . .

It has been contended, by the counsel for the appellant, that, as the word to "regulate" implies in its nature full power over the thing to be regulated, it excludes, necessarily, the action of all others that would perform the same operation on the same thing. That regulation is designed for the entire result. . . . It produces a uniform whole, which is as much disturbed and deranged by changing what the regulating power designs to leave untouched, as that on which it has operated.

There is great force in this argument, and the court is not satisfied that it has been refuted.

Since, however, in exercising the power of regulating their own purely internal affairs, whether of trading or police, the States may sometimes enact laws, the validity of which depends on their interfering with, and being contrary to, an act of congress passed in pursuance of the constitution, the court will enter upon the inquiry, whether the laws of New York, as expounded by the highest tribunal of that State, have, in their application to this case, come into collision with an act of congress, and deprived a citizen of a right to which that act entitles him. Should this collision exist, it will be immaterial whether those laws were passed in virtue of a concurrent power "to regulate commerce with foreign nations and among the several States," or in virtue of a power to regulate their domestic trade and police. In one case and the other, the acts of New York must yield to the law of congress; and the law sustaining the privilege they confer, against a right given by a law of the union, must be erroneous.

This opinion has been frequently expressed in this court, and is founded as well on the nature of the government as on the words of the constitution. In argument, however, it has been contended that, if a law passed by a State, in the exercise of its acknowledged sovereignty, comes into conflict with a law passed by congress in pursuance of the constitution, they affect the subject, and each other, like equal opposing powers.

But the framers of our constitution foresaw this state of things, and provided for it by declaring the supremacy not only of itself, but of the laws made in pursuance of it. The nullity of any act, inconsistent with the constitution, is produced by the declaration that the constitu-

tion is the supreme law. The appropriate application of that part of the clause which confers the same supremacy on laws and treaties, is to such acts of the state legislatures as do not transcend their powers, but, though enacted in the execution of acknowledged state powers, interfere with, or are contrary to the laws of congress, made in pursuance of the constitution, or some treaty made under the authority of the United States. In every such case, the act of congress, or the treaty, is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it. . . .

The questions whether the conveyance of passengers be a part of the coasting trade, and whether a vessel can be protected in that occupation by a coasting license, are not, and cannot be, raised in this case. The real and sole question seems to be, whether a steam machine, in actual use, deprives a vessel of the privilege conferred by a license. . . .

But all inquiry into this subject seems to the court to be put completely at rest, by the act already mentioned, entitled, "An act for the enrolling and licensing of steamboats." . . .

This act demonstrates the opinion of Congress, that steamboats may be enrolled and licensed, in common with vessels using sails. They are, of course, entitled to the same privileges, and can no more be restrained from navigating waters, and entering ports which are free to such vessels, than if they were wafted on their voyage by the winds, instead of being propelled by the agency of fire. . . .

As this decides the cause, it is unnecessary to enter in an examination of that part of the constitution which empowers congress to promote the progress of science and the useful arts. . . .

Powerful and ingenious minds, taking as postulates that the powers expressly granted to the government of the Union, are to be contracted by construction into the narrowest possible compass, and that the original powers of the States are retained, if any possible construction will retain them, may, by a course of well-digested but refined and metaphysical reasoning founded on these premises, explain away the constitution of our country, and leave it a magnificent structure, indeed, to look at, but totally unfit for use. . . . In such a case, it is peculiarly necessary to recur to safe and fundamental principles to sustain those principles, and, when sustained, to make them the tests of the arguments to be examined.

MR. JUSTICE JOHNSON, concurring.

The judgment entered by the court in this cause, has my entire approbation; but having adopted my conclusions on views of the sub-

ject materially different from those of my brethren, I feel it incumbent on me to exhibit those views. . . .

In attempts to construe the constitution, I have never found much benefit resulting from the inquiry, whether the whole, or any part of it, is to be construed strictly, or literally. The simple, precise, yet comprehensive language in which it is couched, leave, at most, but very little latitude for construction; and when its intent and meaning is discovered, nothing remains but to execute the will of those who made it, in the best manner to effect the purposes intended. The great and paramount purpose was to unite this mass of wealth and power, for the protection of the humblest individual; his rights, civil and political, his interests and prosperity, are the sole end; the rest are nothing but the means. . . .

The strong sympathies, rather than the feeble government, which bound the States together during the common war, dissolved on the return of peace; and the very principles which gave rise to the war of the Revolution, began to threaten the confederacy with anarchy and ruin. . . .

For a century the States had submitted, with murmurs, to the commercial restrictions imposed by the parent State; and now, finding themselves in the unlimited possession of those powers over their own commerce which they had so long been deprived of and so earnestly coveted, that selfish principle, which, well controlled, is so salutary, and which, unrestricted, is so unjust and tyrannical, guided by inexperience and jealousy, began to show itself in iniquitous laws and impolitic measures, from which grew up a conflict of commercial regulations, destructive to the harmony of the States, and fatal to their commercial interests abroad.

This was the immediate cause that led to the forming of a convention. . . .

The history of the times will, therefore, sustain the opinion, that the grant of power over commerce, if intended to be commensurate with the evils existing, and the purpose of remedying those evils, could only be commensurate with the power of the States over the subject. And this opinion is supported by a very remarkable evidence of the general understanding of the whole American people when the grant was made.

Concurrent Power

THE PASSENGER CASES.

Supreme Court of the United States, 1848.

7 Howard 283.

[These cases came up on writs of error from the highest courts of appellate jurisdiction in the States of New York and Massachusetts, respectively. The New York State Legislature passed a law requiring from the master of every vessel from a foreign port \$1.50 for himself and each cabin passenger, and \$1.00 for each member of the crew and each steerage passenger; it required, also, from the master of every vessel in the coasting trade 25¢ for himself and for each member of the crew and from each passenger. The money so received was called "hospital moneys" and was placed in the control of the State commissioners of health. Coasting vessels from New Jersey, Connecticut and Rhode Island were required to pay these taxes for only one voyage a month. The law of Massachusetts required the officers of each port to examine the condition of all alien passengers on vessels calling at the port, and forbade the landing of any "lunatic or indigent passenger" unless the "master, owner, consignee, or agent of such vessel" should post a bond of \$1000 to ensure that such a passenger should not become a burden upon the town. All other alien passengers were permitted to land only after the proper representative of the vessel had paid \$2 per passenger into the municipal treasury. This money was allocated to the "support of foreign paupers." In each case the master of a British ship was concerned. In the New York case, the health commissioner, Turner, brought an action of debt under the statute against the master to recover \$1 for each of the 290 steerage passengers. In the Massachusetts case, the master paid under protest \$38 to cover the landing of 19 alien passengers, and then brought suit against the City of Boston, the port of debarkation, to recover the money.]

McLEAN, J. . . . I will consider the case under two general heads:—

1. Is the power of congress to regulate commerce an exclusive power?
2. Is the statute of New York a regulation of commerce?

In the 8th section of the 1st article of the constitution, it is declared that congress shall have power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

Before the adoption of the constitution, the States, respectively, exer-

cised sovereign power, under no other limitations than those contained in the articles of confederation. . . .

As might have been expected, this independent legislation, being influenced by local interests and policy, became conflicting and hostile, insomuch that a change of the system was necessary to preserve the fruits of the Revolution. This led to the adoption of the federal constitution.

It is admitted that, in regard to the commercial, as to other powers, the States cannot be held to have parted with any of the attributes of sovereignty which are not plainly vested in the federal government and inhibited to the States, either expressly or by necessary implication. This implication may arise from the nature of the power.

[The learned justice then quotes *verbatim* passages from the following cases which assert that the federal power to regulate commerce is exclusive: *Holmes v. Jennison*, 14 Pet. 570; *Houston v. Moore*, 5 Wheat. 23; *Gibbons v. Ogden*, 9 Wheat. 196; *Brown v. Maryland*, 12 Wheat. 446; *Groves v. Slaughter*, 15 Pet. 511; and *New York v. Miln*, 11 Pet. 158. He then proceeds:]

A concurrent power in the States to regulate commerce is an anomaly not found in the constitution. If such power exists, it may be exercised independently of the federal authority.

It does not follow, as is often said, with little accuracy, that, when a state law shall conflict with an act of Congress, the former must yield. On the contrary, except in certain cases named in the Federal constitution, this is never correct when the act of the State is strictly within its powers.

[The learned justice then distinguished *Sturges v. Crowninshield*, 4 Wheat. 122 and *Wilson v. Blackbird Creek Marsh Co.*, 2 Pet. 250. He proceeds:]

A concurrent power excludes the idea of a dependent power. . . . A concurrent power in two distinct sovereignties, to regulate the same thing, is as inconsistent in principle as it is impracticable in action. It involves a moral and physical impossibility. A joint action is not supposed, and two independent wills cannot do the same thing. The action of one, unless there be an arrangement, must necessarily precede the action of the other; and that which is first, being competent, will establish the rule. If the powers be equal, as must be the case, both being sovereign, one may undo what the other does, and this must be the result of their action.

But the argument is, that a State, acting in a subordinate capacity, wholly inconsistent with its sovereignty, may regulate foreign commerce until congress shall act on the same subject, and that the State must then yield to the paramount authority. . . . But this argument degrades the States by making their legislation, to the extent stated, sub-

ject to the will of congress. State powers do not rest upon this basis. . . . State powers are, at all times and under all circumstances, exercised independently of the general government, and are never declared void or inoperative except when they transcend state jurisdiction. . . .

It has been well remarked that the regulation of commerce consists as much in negative as in positive action. There is not a federal power which has been exerted in all its diversified means of operation. . . . Is a commercial regulation open to state action because the federal power has not been exhausted? The supposition of such a power in a State is utterly inconsistent with a commercial power, either paramount or exclusive, in congress. . . .

I come now to inquire, Is the statute of New York a regulation of foreign commerce?

All commercial action within the limits of a State, and which does not extend to any other State or foreign country, is exclusively under state regulation. Congress has no more power to control this than a State has to regulate commerce "with foreign nations and among the several States."

In giving the commercial power to congress, the States did not part with that power of self-preservation which must be inherent in every organized community. They may guard against the introduction of any thing which may corrupt the morals, or endanger the health or lives of their citizens. Quarantine or health laws have been passed by the States, and regulations of police for their protection and welfare.

No one has yet drawn the line clearly, because, perhaps, no one can draw it, between the commercial power of the Union, and the municipal power of a State. Numerous cases have arisen, involving these powers, which have been decided, but a rule has necessarily been observed as applicable to the circumstances of each case. And so must every case be adjudged.

A State cannot regulate foreign commerce, but it may do many things which more or less affect it. It may tax a ship or other vessel used in commerce, the same as other property owned by its citizens. A State may tax the stages in which the mail is transported; but this does not regulate the conveyance of the mail any more than taxing a ship regulates commerce. And yet, in both instances, the tax on the property in some degree affects its use. . . .

The act of New York now under consideration is called a health law. . . . The funds so collected are denominated hospital moneys, and are applied to the use of the marine hospital; the surplus to be paid to the treasurer of the Society for the Reformation of Juvenile Delinquents in the city of New York. . . .

To call this a health law would seem to be a misapplication of the term. It is difficult to perceive how a health law can be extended to the reformation of juvenile offenders. . . .

Of the first and second sections of the Massachusetts law, the learned justice says: This is the exercise of an unquestionable power in the State to protect itself from foreign paupers and other persons who would be a public charge; but the nineteen alien passengers for whom the tax was paid did not come within the second section. . . .

[WAYNE, McLEAN, CATRON, M'KINLEY and GRIER, J.J., concur.]

CATRON, J. The first question arising in this controversy is, whether the legislation of New York, giving rise to the suit, is a regulation of commerce. . . .

Our first step towards establishing an independent government was by the declaration of independence. By that act, it was declared that the British king had endeavored to prevent the population of the colonies by obstructing the laws for the naturalization of foreigners. . . . During the confederation, the States passed naturalization laws for themselves, respectively, in which there was great want of uniformity, and therefore the constitution provided that congress should have power "to establish a uniform rule of naturalization."

It is quite obvious, from these proceedings, that the passengers who were thus in the contemplation of congress were, for the most part, immigrants, or persons coming to settle in the United States with their families. . . .

Now, is it possible to reconcile state laws, laying direct and heavy taxes on every immigrant passenger and every member of his family, with this careful, studied, and ever-increasing security of immigrants against every legal burden or charge of any kind?

And how does the assumption stand, that a poll-tax may be levied on all passengers, notwithstanding our commercial treaties?

The taxes under consideration are imposed upon all persons engaged in commerce who are aliens, no matter where they are from. We have commercial treaties with almost every nation whose inhabitants prosecute commerce to the United States; all these are free to come and enter our country, so far as treaty can secure the right. Many thousands of men are annually engaged in this commerce. It is prosecuted, for a great portion of the territory of the United States, at and through the two great ports where these taxes have been imposed; and it is a matter of history that the greater portion of our foreign commerce enters these ports. There aliens must come as passengers to prosecute commerce and trade, and the question is: Can the

States tax them out, or tax them at all, in the face of our treaties expressly providing for their free and secure admission?

The question, whether the power to regulate commerce and navigation is exclusive in the government of the United States, or whether a State may regulate within its own waters and ports in particular cases, does not arise in this cause. The question here is, whether a State can regulate foreign commerce by "a revenue measure," for the purposes of its own treasury. . . .

The constitution was a compromise between all the States of conflicting rights among them. They conferred on one government all national power, which it would be impossible to make uniform in a process of legislation by several distinct and independent state governments. . . .

TANEY, C. J., dissenting. . . .

And the first inquiry is, whether, under the constitution of the United States, the federal government has the power to compel the several States to receive every person or class of persons whom it may be the policy or pleasure of the United States to admit. . . .

But it is argued in support of the claim of the plaintiff, that the conveyance of passengers from foreign countries is a branch of commerce and that the grant to congress of the power to regulate commerce is of itself a prohibition to the States to make any regulation upon the subject. The construction of this article of the constitution was fully discussed in the opinions delivered in the license cases, reported in 5 How. 504. . . . It will appear that five justices of this court, being a majority of the whole bench, held that the grant of the power to congress was not a prohibition to the States to make such regulations as they deemed necessary, in their own ports and harbors, for the convenience of trade or the security of health; and that such regulations were valid, unless they came in conflict with an act of congress. . . .

And it is carrying the powers of the general government by construction, and without express grant or necessary implication, much further than has ever heretofore been done, if the former (i.e., the power to prohibit entry) is to be construed to carry with it the latter (i.e., the power to compel admission). . . .

NOTE. It has been said in the discussion of these cases, by those who maintain that the state laws are unconstitutional, that commerce means intercourse; and that the power granted to regulate it ought to be construed to include intercourse. . . . I therefore subjoin this brief note, in order to show that [the argument] has not been overlooked.

It has always been admitted, in the discussions upon this clause of the constitution, that the power to regulate commerce includes navigation, and ships, and crews, because they are the ordinary means of commercial intercourse. . . .

But if intercourse means something more than commerce, and would give to the general government a wider range of power over the States, no one, I am sure, will claim for this court the power to interpolate it, or to construe the constitution as if it was found there. And if, under the authority to regulate commerce, congress cannot compel the States to admit or reject aliens or other persons coming from foreign ports, but would possess the power if the word intercourse is, by construction, substituted in its place, every one will admit that a construction which substitutes a word of larger meaning than the word used in the constitution, could not be justified or defended upon any principle of judicial authority.

The introduction of the word intercourse, therefore, comes to this: if it means nothing more than the word commerce, it is merely the addition of a word without changing the argument; but if it is a word of larger meaning, it is sufficient to say that then this Court cannot substitute it for the word of more limited meaning contained in the constitution. In either view, therefore, of the meaning to be attached to this word intercourse, it can form no foundation for an argument to support the power now claimed for the general government. . . .

DANIEL, J., dissenting. . . .

As guides in the examination of these objections, I will take leave to propound certain rules or principles regarded by myself, at least, as postulates, and conceded to be such, perhaps, by every expositor of the constitution, and of the powers of the state governments.

1. Then, congress has no powers save those which are expressly delegated by the constitution, and such as are necessary to the exercise of powers expressly delegated. Constitution, Art. 1, # 8, clause 18, and Amendments, Art. 10.

2. The necessary auxiliary powers vested by Art. 1, # 8, of the constitution, cannot be correctly interpreted as conferring powers which, in their own nature, are original, independent, substantive powers; they must be incident to original substantive grants, ancillary in their nature and objects, and controlled by and limited to the original grants themselves.

3. The question, whether a law be void for its repugnancy to the constitution, ought seldom, if ever, to be decided in the affirmative in a doubtful case. . . . 6 Cranch, 128. . . .

NELSON, J., dissenting. . . .

WOODBURY, J., dissenting. . . .

But the final objection made to the collection of this money by a State, is a leading and difficult one. It consists in this view, that, though called either a police regulation, or a municipal condition to admission into a State, or a tax on an alien visitor, it is in substance and in truth a regulation of foreign commerce, and, the power to make that being exclusively vested in congress, no State can properly exercise it.

If both points in this position could be sustained, this proceeding of the State might be obliged to yield. But there are two answers to it. One of them is that this statute is not a regulation of commerce; and the other is, that the power to regulate foreign commerce is not made exclusive in congress.

As to the first, this statute does not *eo nomine* undertake "to regulate commerce;" and its design, motive, and object were entirely different.

At the formation of the constitution, the power to regulate commerce attracted but little attention, compared with that to impose duties on imports and tonnage; and this last had caused so much difficulty, both at home and abroad, that it was expressly and entirely taken away from the States, but the former was not attempted to be. The former, too, occupies scarce a page in *The Federalist*, while the latter engrosses several numbers. A like disparity existed in the debates in the convention, and in the early legislation in congress. Nor did the former receive much notice of the profession in construing the constitution till after a quarter of a century. . . .

"To regulate" is to prescribe rules, to control. But the State by this statute prescribes no rules for the "commerce with foreign nations." It does not regulate the vessel or the voyage while in progress. On the contrary, it prescribes rules for a local matter. . . .

[The learned justice then states the rule that a grant of power to congress is not exclusive unless it is expressly made so or is incompatible with the exercise of a similar power by the several States, and cites the cases, hereinbefore given, establishing it. He then discusses the practice of congress and of the state legislatures in using the commerce power and concludes:]

It nowhere seems to have been settled that this power is exclusive in congress, so that the States can enact no laws on any branch of the subject, whether conflicting or not with any acts of congress. But, on the contrary, the majority of the court in the *License Cases*, 5 How. 504, appear to have held that it is not exclusive as to several matters connected in some degree with commerce. The case of *New York v.*

Miln, 11 Pet. 141, seems chiefly to rest on a like principle, and likewise to hold that measures of the character now under consideration are not regulations of commerce.

Indeed, besides these cases, and on this very subject of commerce, a construction has at times been placed, that it is not exclusive in all respects and if truly placed, it is not competent to hold that the state legislation on such incidental, subordinate, and local matters, is utterly void when it does not conflict with some actual legislation by congress. For the silence of congress, which some seem to regard as more formidable than its action, is, whether in full or in part, to be respected and obeyed only where its power is exclusive, and the States are deprived of all authority over the matter. The power must first be shown to be exclusive before any inference can be drawn that the silence of congress speaks. . . .

Hence, if the power "to regulate commerce," be regarded by us as exclusive, so far as respects its operations abroad, or without the limits of the country, because the nature of the grant requires it to be exclusive there, and not exclusive so far as it regards matters consequent on it which are within the limits of a State, and not expressly prohibited to it, nor conflicting with anything done by congress, because the nature of the grant does not require it to be so there, we exercise then what appears to be the spirit of a wise conciliation, and are able to reconcile several opinions elsewhere expressed, some as to the concurrent and some as to the exclusive character of the power "to regulate commerce." It may thus be exclusive as to some matters and not as to others, and everything can, in that aspect, be reconciled and harmonious, and accord, as I have before explained, with the nature and reason of each case, the only constitutional limits where no express restrictions are imposed. I am unable to see any other practical mode of administering the complicated, and sometimes conflicting relations of the federal and state governments, but on a rule like this. . . .

This construction of the constitution, upholding concurrent laws by a State where doubts exist, and it is fairly open for adoption, has much to commend it in this instance, as the States, which singly become feebler and weaker daily as their number and the whole Union increases, being now thirty to one, instead of thirteen to one, will not thus be rendered still feebler, and the central government, daily becoming more powerful and strong, will not thus be rendered still stronger. So the authority of the latter will not thus, by mere construction, be made to absorb and overwhelm the natural and appropriate rights of sovereign States, nor mislead them by silence. . . .

It will operate justly among the States, no less than between them and the general government, as it will leave each to adopt the course

best suited to its peculiar condition, and not leave one helpless borne down with expenses from foreign sources while others are entirely free, nor draw the general government, in order to remedy such inequalities, into a system of police and local legislation, over which their authority is doubtful, as well as their ability to provide so well for local wants as the local governments, and those immediately interested in beneficial results.

A course of harshness towards the States by the general government, or by any of its great departments is a violation of sound principle, will alienate and justly offend, and tend ultimately, no less than disastrously, to dissolve the bands of that Union so useful and glorious to all concerned.

*Libertas ultima mundi,
Quo steterit, ferienda loco.*

COOLEY v. BOARD OF WARDENS OF THE PORT OF PHILADELPHIA.

Supreme Court of the United States. 1851.

12 How. 299.

Error to the Supreme Court of Pennsylvania.

MR. JUSTICE CURTIS delivered the opinion of the court.

These cases are actions to recover half-pilotage fees under the 29th section of the act of the Legislature of Pennsylvania, passed on the second day of March, 1803. The plaintiff in error alleges that the highest court of the State has decided against a right claimed by him under the Constitution of the United States. That right is, to be exempted from the payment of the sums of money, demanded pursuant to the state law above referred to, because that law contravenes several provisions of the Constitution of the United States.

The particular section of the state law drawn in question is as follows: "That every ship or vessel arriving from or bound to any foreign port or place, and every ship or vessel of the burden of seventy-five tons or more, sailing from or bound to any port not within the river Delaware, shall be obliged to receive a pilot. . . . And it shall be the duty of the wardens to enter every such vessel in a book to be kept by them for that purpose, without fee or reward. And if the master of any ship or vessel shall neglect to make such report, he shall forfeit and pay the sum of sixty dollars. And if the master of any such ship or vessel shall refuse or neglect to take a pilot, the master, owner

or consignee of such vessel shall forfeit and pay to the warden aforesaid a sum equal to the half-pilotage of such ship or vessel. . . ."

We think this particular regulation concerning half-pilotage fees, is an appropriate part of a general system of regulations of this subject. Testing it by the practice of commercial states and countries legislating on this subject, we find it has usually been deemed necessary to make similar provisions. Numerous laws of this kind are cited in the learned argument of the counsel for the defendant in error; and their fitness, as part of a system of pilotage, in many places, may be inferred from their existence in so many different states and countries. . . .

It remains to consider the objection that it is repugnant to the third clause of the eighth section of the first article. "The Congress shall have power to regulate commerce with foreign nations and among the several States, and with the Indian tribes."

That the power to regulate commerce includes the regulation of navigation, we consider settled. And when we look to the nature of the service performed by pilots, to the relations which that service and its compensations bear to navigation between the several States, and between the ports of the United States and foreign countries, we are brought to the conclusion, that the regulation of the qualifications of pilots, of the modes and times of offering and rendering their services, of the responsibilities which shall rest upon them, of the powers they shall possess, of the compensation they may demand, and of the penalties by which their rights and duties may be enforced, do constitute regulations of navigation, and consequently of commerce, within the just meaning of this clause of the Constitution. . . .

It becomes necessary, therefore, to consider whether this law of Pennsylvania, being a regulation of commerce, is valid.

The act of Congress of the 7th of August, 1789, sect. 4, is as follows:

"That all pilots shall continue to be regulated in conformity with the existing laws of the States, respectively, wherein such pilots may be, or with such laws as the States may respectively hereafter enact for the purpose, until further legislative provision shall be made by Congress."

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If the States were divested of the power to legislate on this subject by the grant of the commercial power to Congress, it is plain this act could not confer upon them power thus to legislate. If the Constitution excluded the States from making any law regulating commerce, certainly Congress cannot regrant that power. . . . Entertaining these views, we are brought directly and unavoidably to the consideration of the question, whether the grant of the commercial power to

Congress, did *per se* deprive the States of all power to regulate pilots. This question has never been decided by this court, nor, in our judgment, has any case depending upon all the considerations which must govern this one, come before this court. The grant of commercial power to Congress does not contain any terms which expressly exclude the States from exercising an authority over its subject-matter. If they are excluded, it must be because the nature of the power, thus granted to Congress, requires that a similar authority should not exist in the States. If it were conceded on the one side, that the nature of this power is absolutely and totally repugnant to the existence of a similar power in the States, probably no one would deny that the grant of the power to Congress, as effectually and perfectly excludes the States from all future legislation on the subject, as if express words had been used to exclude them. And on the other hand, if it were admitted that the existence of this power in Congress, like the power of taxation, is compatible with the existence of a similar power in the States, then it would be in conformity with the contemporary exposition of the Constitution (Federalist, No. 32), and with the judicial construction, given from time to time by this court, after the most deliberate consideration, to hold that the mere grant of such a power to Congress, did not imply a prohibition on the States to exercise the same power; that it is not the mere existence of such a power, but its exercise by Congress, which may be incompatible with the exercise of the same power by the States, and that the States may legislate in the absence of Congressional regulations. . . .

The diversities of opinion, therefore, which have existed on this subject, have arisen from the different views taken of the nature of this power. But when the nature of a power like this is spoken of, when it is said that the nature of the power requires that it should be exercised exclusively by Congress, it must be intended to refer to the subjects of that power, and to say they are of such a nature as to require exclusive legislation by Congress. Now the power to regulate commerce, embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively demanding that diversity which alone can meet the local necessities of navigation.

Either absolutely to affirm, or deny that the nature of this power requires exclusive legislation by Congress, is to lose sight of the nature of the subjects of this power, and to assert concerning all of them, what is really applicable but to a part. Whatever subjects of this power are in their nature national, or admit only of one uniform system, or

plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress. That this cannot be affirmed of laws for the regulation of pilots and pilotage is plain. . . .

Viewed in this light, so much of this act of 1789 as declares that pilots shall continue to be regulated "by such laws as the States may respectively hereafter enact for that purpose," instead of being held to be inoperative, as an attempt to confer on the States a power to legislate, of which the Constitution had deprived them, is allowed an appropriate and important signification. It manifests the understanding of Congress, at the outset of the government, that the nature of this subject is not such as to require exclusive legislation. The practice of the States, and of the national government, has been in conformity with this declaration, from the origin of the national government to this time; and the nature of the subject when examined is such as to leave no doubt of the superior fitness and propriety, not to say the absolute necessity, of different systems of regulation, drawn from local knowledge and experience, and conformed to local wants. . . . In construing an instrument designed for the formation of a government, and in determining the extent of one of its important grants of power to legislate, we can make no such distinction between the nature of the power and the nature of the subject on which that power was intended practically to operate, nor consider the grant more extensive by affirming of the power, what is not true of its subject now in question.

It is the opinion of a majority of the Court that the mere grant to Congress of the power to regulate commerce did not deprive the States of power to regulate pilots, and that although Congress has legislated on this subject, its legislation manifests an intention, with a single exception, not to regulate this subject, but to leave its regulation to the several States. To these precise questions, which are all we are called on to decide, this opinion must be understood to be confined. It does not extend to the question what other subjects, under the commercial power, are within the exclusive control of Congress, or may be regulated by the States in the absence of all Congressional legislation; nor to the general question, how far any regulation of a subject by Congress, may be deemed to operate as an exclusion of all legislation by the States upon the same subject. We decide the precise questions before us, upon what we deem sound principles, applicable to this particular subject in the state in which the legislation of Congress has left it. We go no further. . . .

MR. JUSTICE MCLEAN and MR. JUSTICE WAYNE dissented; and MR. JUSTICE DANIEL, although he concurred in the judgment of the court, yet dissented from its reasoning. . . .

THE MINNESOTA RATE CASES. 230 U.S. 352 (1913) [The State of Minnesota had prescribed maximum rates for freight between intrastate points, and a two-cent fare for passengers. The railroads contended that the new rates disturbed the balance between interstate and intrastate rates, and thus burdened directly interstate commerce, as between (a) cities on the boundary of Minnesota, and (b) places situated within different competitive jobbing centers, and as (c) discriminating against localities outside the State. The new rates were also alleged to be confiscatory. The suits were brought by stockholders to restrain the enforcement of the new schedules.]

MR. JUSTICE HUGHES delivered the opinion of the court. . . . *First. As to interference with interstate commerce.* . . . (1.) The general principles governing the exercise of state authority when interstate commerce is affected are well established. The power of Congress to regulate commerce among the several States is supreme and plenary. . . . The conviction of its necessity sprang from the disastrous experiences under the Confederation when the States vied in discriminatory measures against each other. In order to end these evils, the grant in the Constitution conferred upon Congress an authority at all times adequate to secure the freedom of interstate commercial intercourse from state control and to provide effective regulation of that intercourse as the national interest may demand. . . .

. . . . There is no room in our scheme of government for the assertion of state power in hostility to the authorized exercise of Federal power. The authority of Congress extends to every part of interstate commerce, and to every instrumentality or agency by which it is carried on; and the full control by Congress of the subjects committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations. This is not to say that the Nation may deal with the internal concerns of the State, as such, but that the execution by Congress of its constitutional power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven therewith that the effective government of the former incidentally controls the later. This conclusion necessarily results from the supremacy of the national power within its appointed sphere. . . .

The grant in the Constitution of its own force, that is, without action by Congress, established the essential immunity of interstate commercial intercourse from the direct control of the States with respect to those subjects embraced within the grant which are of such a nature as to demand that, if regulated at all, their regulation should be prescribed by a single authority. It has repeatedly been declared by this court that as to those subjects which require a general system or uniformity of regulation the power of Congress is exclusive. In other matters, admitting of diversity of treatment according to the special

requirements of local conditions, the States may act within their respective jurisdictions until Congress sees fit to act; and, when Congress does act, the exercise of its authority overrides all conflicting state legislation. *Cooley v. Board of Wardens*, 12 How. 299, 319. . . .

Thus, the States cannot tax interstate commerce, either by laying the tax upon the business which constitutes such commerce or the privilege of engaging in it, or upon the receipts, as such, derived from it (*State Freight Tax Case*, 15 Wall. 232;) or upon persons or property in transit in interstate commerce (*Passenger Cases*, 7 How. 283)

They have no power to prohibit interstate trade in legitimate articles of commerce. . . . *Leisy v. Hardin*, 135 U.S. 100; or to discriminate against the products of other States *Ward v. Maryland*, 12 Wall. 418; or to exclude from the limits of the State corporations or others engaged in interstate commerce or to fetter by conditions their right to carry it on (*Crutcher v. Kentucky*, 141 U.S. 47;) or to prescribe the rates to be charged for transportation from one State to another, or to subject the operations of carriers in the course of such transportation to requirements that are unreasonable or pass beyond the bounds of suitable local protection (*Wabash &c. Railway Co. v. Illinois*, 118 U.S. 557, 577;)

But within these limitations there necessarily remains to the States until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction although interstate commerce may be affected. . . . Thus, there are certain subjects having the most obvious and direct relation to interstate commerce, which nevertheless, with the acquiescence of Congress, have been controlled by state legislation from the foundation of the Government because of the necessity that they should not remain unregulated and that their regulation should be adapted to varying local exigencies. . . . Further, it is competent for a State to govern its internal commerce, to provide local improvements, to create and regulate local facilities, to adopt protective measures of a reasonable character in the interest of the health, safety, morals and welfare of its people, although interstate commerce may incidentally or indirectly be involved. . . .

A State is entitled to protect its coasts, to improve its harbors, bays and streams, and to construct dams and bridges across navigable rivers within its limits, unless there is conflict with some act of Congress. . . .

While the State may not impose a duty on tonnage, it may regulate wharfage charges and exact tolls for the use of artificial facilities provided under its authority. . . .

Quarantine regulations are essential measures of protection which the States are free to adopt when they do not come into conflict with Federal action. . . . They cannot, of course, be made the cover for

discriminations and arbitrary enactments having no reasonable relation to health. . . .

State inspection laws and statutes designed to safeguard the inhabitants of a State from fraud and imposition are valid when reasonable in their requirements and not in conflict with Federal rules, although they may affect interstate commerce. . . .

Interstate carriers, in the absence of Federal statute providing a different rule, are answerable according to the law of the State for nonfeasance or misfeasance within its limits. . . . Cars employed in interstate commerce may be seized by attachment under state law, in order to compel the payment of debts. . . . It has also been held that the State has the power to forbid the consolidation of state railroad corporations with competing lines although both may be interstate carriers and the prohibition may have a far-reaching effect upon interstate commerce. *Pearsall v. Great Northern Ry. Co.*, 161 U. S. 646, 677. . . . See *Northern Securities Co. v. United States*, 193 U.S. 197, 317, 348, 382.

(2) These principles apply to the authority of the State to prescribe maximum rates for intrastate transportation.

State regulation of railroad rates began with railroad transportation. . . . As a rule the restrictions imposed by the early legislation were far from onerous, but they are significant in the assertion of the right of control. . . .

The authority of the State to limit by legislation the charges of common carriers within its borders was not confined to the power to impose limitations in connection with grants of corporate privileges. In view of the nature of their business, they were held subject to legislative control as to the amount of their charges unless they were protected by their contract with the State . . . following *Munn v. Illinois*, 94 U.S. 113. . . .

In *Wabash St. L. & P. Railway Co. v. Illinois*, [118 U.S. 557], it was finally determined that the authority of the State did not extend to the regulation of charges for interstate transportation. . . .

But no doubt was entertained of the State's authority to regulate rates for transportation that was wholly intrastate. . . .

If this authority of the State be restricted, it must be by virtue of the paramount power of Congress over interstate commerce and its instruments; and, in view of the nature of the subject, a limitation may not be implied because of a dormant Federal power, that is, one which has not been exerted, but can only be found in the actual exercise of Federal control in such measure as to exclude this action by the State. . . .

(3) When Congress, in the year 1887, enacted the Act to Regulate Commerce (24 Stat. 379, c. 104), it was acquainted with the course of the development of railroad transportation and with the exercise by the States of the rate-making power. . . . And it was the fact that beyond the bounds of state control there lay a vast field of unregulated activity in the conduct of interstate transportation which was found to be the chief cause of the demand for Federal action.

Congress carefully defined the scope of its regulation, and expressly provided that it was not to extend to purely intrastate traffic. . . .

There was thus excluded from the provisions of the act that transportation which was "wholly within one State," with the specified qualification where its subject was going to or coming from a foreign country.

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The question we have now before us, essentially, is whether after the passage of the Interstate Commerce Act, and its amendment, the State continued to possess the state-wide authority which it formerly enjoyed to prescribe rates for its exclusively internal traffic. . . .

Congress did not undertake to say that the intrastate rates of interstate carriers should be reasonable or to invest its administrative agency with authority to determine their reasonableness. Neither by the original act nor by its amendment, did Congress seek to establish a unified control over interstate and intrastate rates; it did not set up a standard for intrastate rates, or prescribe, or authorize the Commission to prescribe, either maximum or minimum rates for intrastate traffic. . . .

The effect of intrastate rates upon interstate rates was urged in *Smyth v. Ames*, 169 U.S. 466, and in the cases decided therewith. . . . It was ruled that the reasonableness of intrastate rates was to be determined by considering the intrastate business separately. . . . It is plain that had the intrastate rates, established by the comprehensive statute of Nebraska, not been found to be confiscatory they would have been sustained in their application to all intrastate traffic. . . .

To suppose, however, that the exercise of this acknowledged power of the State may be permitted to create an irreconcilable conflict with the authority of the Nation, or that through an equipoise of powers an effective control of interstate commerce is rendered impossible, is to overlook the dominant operation of the Constitution which, creating a Nation, equipped it with an authority, supreme and plenary, to control National commerce and to prevent that control, exercised in the wisdom of Congress, from being obstructed or destroyed by any opposing action. But, as we said at the outset, our system of government is a practical adjustment by which the National authority as conferred by the Constitution is maintained in its full scope with-

out unnecessary loss of local efficiency. It thus clearly appears that, under the established principles governing state action, the State of Minnesota did not transcend the limits of its authority in prescribing the rates here involved, assuming them to be reasonable intrastate rates. . . .

The interblending of operations in the conduct of interstate and local business by interstate carriers is strongly pressed upon our attention. It is urged that the same right-of-way, terminals, rails, bridges, and stations are provided for both classes of traffic; that the proportion of each sort of business varies from year to year and, indeed, from day to day; that no division of the plant, no apportionment of it between interstate and local traffic, can be made today, which will hold tomorrow; that terminals, facilities and connections in one State aid the carrier's entire business and are an element of value with respect to the whole property and the business in other States; that securities are issued against the entire line of the carrier and cannot be divided by States; that tariffs should be made with a view to all the traffic of the road and should be fair as between through and short-haul business; and that, in substance, no regulation of rates can be just, which does not take into consideration the whole field of the carrier's operations, irrespective of state lines. The force of these contentions is emphasized in these cases, and in others of like nature, by the extreme difficulty and intricacy of the calculations which must be made in the effort to establish a segregation of intrastate business for the purpose of determining the return to which the carrier is properly entitled therefrom.

But these considerations are for the practical judgment of Congress in determining the extent of the regulation necessary under existing conditions of transportation to conserve and promote the interests of interstate commerce. If the situation has become such, by reason of the interblending of the interstate and intrastate operations of interstate carriers, that adequate regulation of their interstate rates cannot be maintained without imposing requirements with respect to their intrastate rates which substantially affect the former, it is for Congress to determine, within the limits of its constitutional authority over interstate commerce and its instruments the measure of the regulation it should supply. It is the function of this court to interpret and apply the law already enacted, but not under the guise of construction to provide a more comprehensive scheme of regulation than Congress has decided upon. Nor, in the absence of Federal action, may we deny effect to the laws of the State enacted within the field which it is entitled to occupy until its authority is limited through the exertion by Congress of its paramount constitutional power.

Second. Are the State's acts and orders confiscatory?

The rate-making power is a legislative power and necessarily implies a range of legislative discretion. We do not sit as a board of revision to substitute our judgment for that of the legislature, or of the commission lawfully constituted by it, as to matters within the province of either. . . . The case falls within a well-defined category. Here we have a general schedule of rates, involving the profitableness of the intrastate operations of the carrier taken as a whole, and the inquiry is whether the State has overstepped the constitutional limit by making the rates so unreasonably low that the carriers are deprived of their property without due process of law and denied the equal protection of the laws.

The property of the railroad corporation has been devoted to a public use. There is always the obligation springing from the nature of the business in which it is engaged . . . that there shall not be an exorbitant charge for the service rendered. But the State has not seen fit to undertake the service itself; and the private property embarked in it is not placed at the mercy of legislative caprice. It rests secure under the constitutional protection which extends not merely to the title but to the right to receive just compensation for the service given to the public. [Here follows the citation of a line of cases beginning with *Stone v. Farmers' Loan & Trust Co.*, 116 U.S. 307, including *Smyth v. Ames*, *supra*, and closing with *Willcox v. Consolidated Gas Co.*, 212 U.S. 19.]

In determining whether that right has been denied, each case must rest upon its special facts. But the general principles which are applicable in a case of this character have been set forth in the decisions.

(1.) The basis of calculation is the "fair value of the property" used for the convenience of the public. *Smyth v. Ames*, *supra* (p. 546). . . .

(2.) The ascertainment of that value is not controlled by artificial rules. It is not a matter of formulas, but there must be a reasonable judgment having its basis in a proper consideration of all relevant facts. . . .

(3.) Where the business of the carrier is both interstate and intrastate, the question whether a scheme of maximum rates fixed by the State for intrastate transportation affords a fair return, must be determined by considering separately the value of the property employed in the intrastate business and the compensation allowed in that business under the rates prescribed. . . .

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The evidence in these cases demonstrates that the appraisements of the St. Paul and Minneapolis properties . . . were in substance appraisals

of what was considered to be the peculiar value of the railroad right-of-way. . . .

The question is whether, in determining the fair present value of the property of the railroad company as a basis of its charges to the public, it is entitled to a valuation of its right-of-way not only in excess of the amount invested in it, but also in excess of the market value of contiguous and similarly situated property. . . .

It is clear that in ascertaining the present value we are not limited to the consideration of the amount of the actual investment. If that has been reckless or improvident, losses may be sustained which the community does not underwrite. As the company may not be protected in its actual investment, if the value of the property be plainly less, so the making of a just return for the use of the property involves the recognition of its fair value if it be more than its cost. . . . And where the inquiry is as to the fair value of the property, in order to determine the reasonableness of the return allowed by the rate-making power, it is not admissible to attribute to the property owned by the carriers a speculative increment of value, over the amount invested in it and beyond the value of similar property owned by others, solely by reason of the fact that it is used in the public service. . . . It is an increment which cannot be referred to any known criterion. . . . For an allowance of this character there is no warrant. . . .

The Master allowed the cost of reproduction new without deduction for depreciation. It was not denied that there was depreciation in fact. . . . But it was found that this depreciation was more than offset by appreciation. . . .

We cannot approve this disposition of the matter of depreciation. . . . And when an estimate of value is made on the basis of reproduction new, the extent of existing depreciation should be shown and deducted. . . . If there are items entering into the estimate of cost which should be credited with appreciation, this also should appear, so that instead of a broad comparison there should be specific findings showing the items which enter into the account of physical valuation on both sides.

It must be remembered that we are concerned with a charge of confiscation of property by the denial of a fair return for its use; and to determine the truth of the charges there is sought to be ascertained the present value of the property. The realization of the benefits of property must always depend in a large degree on the ability and sagacity of those who employ it, but the appraisement is of an instrument of public service, as property, not of the skill of the users. And when particular physical items are estimated as worth so much new, if in fact they be depreciated, this amount should be found and allowed

for. If this is not done, the physical valuation is manifestly incomplete. And it must be regarded as incomplete in this case. . . .

The apportionment of the value of the property, as found, between the interstate and intrastate business was made upon the basis of the gross revenue derived from each. This is a simple method, easily applied, and for that reason has been repeatedly used. It has not, however, been approved by this court and its correctness is now challenged.

In support of this method, it is said that a division of the value of the property according to gross earnings is a division according to the "value of the use," and therefore proper. But it would seem clear that the value of the use is not shown by *gross* earnings. The gross earnings may be consumed by expenses, leaving little or no profit. If, for example, the intrastate rates were so far reduced as to leave no net profits, and the only profitable business was the interstate business, it certainly could not be said that the value of the use was measured by the gross revenue.

It is not asserted that the relation of expense to revenue is the same in both businesses; on the contrary, it is insisted that it is widely different. . . .

If the property is to be divided according to the value of the use, it is plain that the gross-earnings method is not an accurate measure of that value. . . .

The value of the use, as measured by return, cannot be made the criterion when the return itself is in question. If the return, as formerly allowed, be taken as the basis, then the validity of the State's reduction would have to be tested by the very rates which the State denounced as exorbitant. And, if the return as permitted under the new rates be taken, then the State's action itself reduces the amount of value upon which the fairness of the return is to be computed.

When rates are in controversy, it would seem to be necessary to find a basis for a division of the total value of the property independently of revenue, and this must be found in the use that is made of the property. That is, there should be assigned to each business, that proportion of the total value of the property which will correspond to the extent of its employment in that business. It is said that this is extremely difficult; in particular, because of the necessity for making a division between the passenger and freight business and the obvious lack of correspondence between ton-miles and passenger-miles. It does not appear, however, that these are the only units available for such a division. . . .

We are of opinion that on an issue of this character involving the constitutional validity of state action, general estimates of the sort here

submitted, with respect to a subject so intricate and important, should not be accepted as adequate proof to sustain a finding of confiscation. While accounts have not been kept so as to show the relative cost of interstate and intrastate business, giving particulars of the traffic handled on through and local trains, and presenting data from which such extra cost, as there may be, of intrastate business may be suitably determined, it would appear to have been not impracticable to have had such accounts kept or statistics prepared at least during test periods properly selected. It may be said that this would have been a very difficult matter, but the company having assailed the constitutionality of the state acts and orders was bound to establish its case, and it was not entitled to rest on expressions of judgment when it had in its power to present accurate data which would permit the court to draw the right conclusion. . . .

MR. JUSTICE MCKENNA concurs in the result.

HOUSTON, E. & W. TEXAS RY. CO. *v.* UNITED STATES.

Supreme Court of the United States. 1914.
234 U.S. 342.

(THE SHREVEPORT CASE)

[Appeal from a decision of the United States Commerce Court which had dismissed petitions to set aside an order of the Interstate Commerce Commission fixing certain rates for haulage between Shreveport, Louisiana and Dallas and other points in Texas. Intrastate rates in Texas were fixed by the Texas Railway Commission, so as to discriminate against Shreveport. For example: the rate on furniture from Shreveport to Longview, Texas, was 35 cents for a distance of 65.7 miles; but the rate from Dallas to Longview was 24.8 cents, though the distance was 124 miles. Again: the rate on wagons from Shreveport to Marshall, Texas, 42 miles, was 56 cents; from Dallas to Marshall, 147.7 miles, it was 36.8 cents. The Interstate Commerce Commission had declared the interstate rates from Shreveport reasonable, and had ordered, further, that the carriers should charge no higher rate from Shreveport to Dallas and intermediate points than they charged from Dallas towards Shreveport for an equal distance. It was this order which it was sought to set aside.]

MR. JUSTICE HUGHES delivered the opinion of the court. . . .

The point of the objection to the order is that, as the discrimination found by the Commission to be unjust arises out of the relation of intra-

state rates, maintained under state authority, to interstate rates that have been upheld as reasonable, its correction was beyond the Commission's power. . . . The holding of the Commerce Court was that the order relieved the appellants from further obligation to observe the intrastate rates and that they were at liberty to comply with the Commission's requirements by increasing these rates sufficiently to remove the forbidden discrimination. The invalidity of the order in this aspect is challenged upon two grounds:

(1) That Congress is impotent to control the intrastate charges of an interstate carrier even to the extent necessary to prevent injurious discrimination against interstate traffic; and

(2) That, if it be assumed that Congress has this power, still it has not been exercised, and hence the action of the Commission exceeded the limits of the authority which has been conferred upon it.

First. It is unnecessary to repeat what has frequently been said by this court with respect to the complete and paramount character of the power confided to Congress to regulate commerce among the several States. It is of the essence of this power that, where it exists, it dominates. Interstate trade was not left to be destroyed or impeded by the rivalries of local governments. The purpose was to make impossible the recurrence of the evils which had overwhelmed the Confederation and to provide the necessary basis of national unity by insuring "uniformity of regulation against conflicting and discriminating state legislation." By virtue of the comprehensive terms of the grant, the authority of Congress is at all times adequate to meet the varying exigencies that arise and to protect the national interest by securing the freedom of interstate commercial intercourse from local control. . . .

Congress is empowered to regulate,—that is, to provide the law for the government of interstate commerce; to enact "all appropriate legislation" for its "protection and advancement," *The Daniel Ball*, 10 Wall. 557, 564; to adopt measures "to promote its growth and insure its safety," *County of Mobile v. Kimball*, (102 U.S. 691, 696, 697); "to foster, protect, control and restrain," *Second Employers' Liability Cases*, (223 U.S. 1, 47, 53, 54). Its authority, extending to these interstate carriers as instruments of interstate commerce, necessarily embraces the right to control their operations in all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance. As it is competent for Congress to legislate to these ends, unquestionably it may seek their attainment by requiring that the agencies of interstate commerce shall not be used in such a manner as to cripple, retard or

destroy it. The fact that carriers are instruments of intrastate commerce, as well as of interstate commerce, does not derogate from the complete and paramount authority of Congress over the latter or preclude the Federal power from being exerted to prevent the intrastate operations of such carriers from being made a means of injury to that which has been confided to Federal care. Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the State, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority, and the State, and not the Nation, would be supreme within the national field. . . .

. . . . This is not to say that Congress possesses the authority to regulate the internal commerce of a State, as such, but that it does possess the power to foster and protect interstate commerce, and to take all measures necessary and appropriate to that end, although intrastate transactions of interstate carriers may thereby be controlled.

This principle is applicable here. We find no reason to doubt that Congress is entitled to keep the highways of interstate communication open to interstate traffic upon fair and equal terms. That an unjust discrimination in the rates of a common carrier, by which one person or locality is unduly favored as against another under substantially similar conditions of traffic, constitutes an evil is undeniable; and where this evil consists in the action of an interstate carrier in unreasonably discriminating against interstate traffic over its line, the authority of Congress to prevent it is equally clear. It is immaterial, so far as the protecting power of Congress is concerned, that the discrimination arises from intrastate rates as compared with interstate rates. The use of the instrument of interstate commerce in a discriminatory manner so as to inflict injury upon that commerce, or some part thereof, furnishes abundant ground for Federal intervention. Nor can the attempted exercise of state authority alter the matter, where Congress has acted, for a State may not authorize a carrier to do that which Congress is entitled to forbid and has forbidden.

It is also to be noted—as the Government has well said in its argument in support of the Commission's order—that the power to deal with the relation between the two kinds of rates, as a relation, lies exclusively with Congress. It is manifest that the States cannot fix the relation of the carrier's interstate and intrastate charges without directly interfering with the former, unless it simply follows the standard set by Federal authority. . . .

It is also clear that, in removing the injurious discriminations against interstate traffic arising from the relation of intrastate to interstate rates, Congress is not bound to reduce the latter below what it may deem to

be a proper standard fair to the carrier and to the public. . . . Congress is entitled to maintain its own standard as to these rates and to forbid any discriminatory action by interstate carriers which will obstruct the freedom of movement of interstate traffic over their lines in accordance with the terms it establishes.

Having this power, Congress could provide for its execution through the aid of a subordinate body. . . .

MR. JUSTICE LURTON and MR. JUSTICE PITNEY dissent.

Commerce as Movement

COE *v.* ERROL.

Supreme Court of the United States. 1886.

116 U.S. 517.

Error to the Supreme Court of the State of New Hampshire.

[Edward S. Coe and others owned a large number of spruce logs against which State, town and county taxes were assessed. All the logs, when taxed, were deposited in the town of Errol, New Hampshire. 1. One quantity had been cut in New Hampshire in the winter of 1879 and had been brought to Errol and placed in the river there and on the river's banks. From there they were to be floated in the following spring down the Androscoggin River into Maine to be manufactured and sold. 2. A second lot had been cut in Maine, and was being floated to Lewiston, Maine, but was being detained at Errol by low water in the river there. 3. A third lot, also, cut in Maine and destined for Lewiston, had been deposited at Errol in 1880. 4. In 1880 also a lot was cut in New Hampshire and deposited on land owned by two citizens of Errol, while awaiting the continuation of their passage to Maine. For more than twenty years the Androscoggin River had been used as a public highway for floating logs from the river's tributaries in New Hampshire and from the lakes and rivers of Maine to Lewiston, Maine.]

MR. JUSTICE BRADLEY delivered the opinion of the court. . . .

The question for us to consider . . . is, whether the products of a State (in this case timber cut in its forests) are liable to be taxed like other property within the State, though intended for exportation to another State, and partially prepared for that purpose by being deposited at a place of shipment, such products being owned by persons residing in another State.

We have no difficulty in disposing of the last condition of the question, namely, the fact (if it be a fact) that the property was owned by persons residing in another State; for, if not exempt from taxation for other reasons, it cannot be exempt by reason of being owned by non-residents. . . .

Do the owner's state of mind in relation to the goods, that is, his intent to export them, and his partial preparation to do so, exempt them from taxation? This is the precise question for solution.

This question does not present the predicament of goods in course of transportation through a State, though detained for a time within the State by low water or other causes of delay, as was the case of the logs cut in the State of Maine, the tax on which was abated by the Supreme Court of New Hampshire. Such goods are already in the course of commercial transportation, and are clearly under the protection of the Constitution. And so, we think, would the goods in question be when actually started in the course of transportation to another State, or delivered to a carrier for such transportation. There must be a point of time when they cease to be governed exclusively by the domestic law and begin to be governed and protected by the national law of commercial regulation, and that moment seems to us to be a legitimate one for this purpose, in which they commence their final movement for transportation from the State of their origin to that of their destination. When the products of the farm or the forest are collected and brought in from the surrounding country to a town or station serving as entrepôt for that particular region, whether on a river or a line of railroad, such products are not yet exports, nor are they in process of exportation, nor is exportation begun until they are committed to the common carrier for transportation out of the State to the State of their destination, or have started on their ultimate passage to that State. Until then it is reasonable to regard them as not only within the State of their origin, but as a part of the general mass of property of that State, subject to its jurisdiction, and liable to taxation there. . . . Though intended for exportation, they may never be exported; the owner has a perfect right to change his mind; and until actually put in motion, for some place out of the State, or committed to the custody of a carrier for transportation to such a place, why may they not be regarded as still remaining a part of the general mass of property in the State?

The point of time when State jurisdiction over the commodities of commerce begins and ends is not an easy matter to designate or define. . . . In regard to imports from foreign countries, it was settled in the case of *Brown v. Maryland*, 12 Wheat. 419, that the State cannot impose any tax or duty on such goods so long as they remain the property of the importer, and continue in the original form or packages in which

they were imported. . . . This court . . . has since held that goods transported from one State to another are not imports or exports within the meaning of the prohibitory clauses . . . ; and it has also held that such goods, having arrived at their place of destination, may be taxed in the State to which they are carried, if taxed in the same manner as other goods are taxed, and not by reason of their being brought into the State from another State, nor subjected in any way to unfavorable discrimination. *Woodruff v. Parham*, 8 Wall. 123; *Brown v. Houston*, 114 U.S. 622.

But no definite rule has been adopted with regard to the point of time at which the taxing power of the State ceases as to goods exported to a foreign country or to another State. What we have already said, however, in relation to the products of a State intended for exportation to another State will indicate the view which seems to us the sound one on that subject, namely, that such goods do not cease to be part of the general mass of property in the State, subject, as such, to its jurisdiction, and to taxation in the usual way, until they have been shipped, or entered with a common carrier for transportation to another State, or have been started upon such transportation in a continuous route or journey. We think that this must be the true rule on the subject. . . .

The application of these principles to the present case is obvious. The logs which were taxed . . . had not, when so taxed, been shipped or started on their final voyage or journey to the State of Maine. They had only been drawn down . . . to Errol, the place from which they were to be transported to Lewiston in the State of Maine. There they were to remain until it should be convenient to send them to their destination. They come precisely within the character of property which, according to the principles herein laid down, is taxable. . . . If thus taxed, in the usual way that other similar property is taxed, and at the same rate, and subject to like conditions and regulations, the tax is valid. . . .

These conditions we understand to have been complied with in the present case. . . .

MINNESOTA *v.* BLASIUS.

Supreme Court of the United States. 1933.
290 U.S. 1.

MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court.

Respondent, George Blasius, is a trader in livestock at the St. Paul Union Stockyards in South St. Paul, Minn. On May 1, 1929, he owned and had in his possession in these yards eleven head of cattle which were assessed for taxation as his personal property, under the general tax law

of the state. In this action, brought to collect the tax, Blasius defended upon the ground that the cattle were in course of interstate commerce, and a part of that commerce, and were not subject to state taxation. The Supreme Court of the state, overruling the decision of the trial court, sustained this defense and this Court granted certiorari.

The material facts, as found by the trial court, are these: At the St. Paul Union Stockyards, thousands of head of livestock arrive daily by railroad and truck and are promptly sold and moved. The livestock come from the State of Minnesota and other States throughout the northwest. The class of livestock which Blasius buys on the market are [*sic*] those that go immediately thereafter into the hands of feeders or growers within and without the State of Minnesota and principally beyond the borders of that State. He has not dealt in livestock for immediate slaughter. Thus, it was the practice of Blasius to go upon the market at the stockyards and buy livestock to meet the requirements of his trade, and in the regular course of his business practically all cattle purchased by him were sold and shipped to nonresidents of the State, although selling and shipping to residents of the State did sometimes occur.

The eleven head of cattle in question came to the yards from some point outside of the State of Minnesota; they had been consigned to commission firms for sale at the South St. Paul market; the consignors "had no intent to transport said cattle to any other place than South St. Paul, nor did they have any intent that such cattle should be transported to any particular place after their sale"; they were bought by Blasius from the commission merchants on April 30, 1929, and on May 1, 1929, the tax date, they were owned by him and "had not been entered with any carrier for shipment to any point," but were being offered for sale on the market; seven of the eleven head were sold on that day to a non-resident purchaser and were immediately shipped by the purchaser to points outside the State of Minnesota; the remaining four head were similarly sold and shipped on the following day. After his purchase Blasius placed the cattle in pens leased by him from the stockyards company; he paid for their feed and water up to the time of resale.

The court found that Blasius was not "subject to any discrimination in favor of cattle solely the product of the State of Minnesota"; that the assessment was made at the regular time and in the usual manner for taxation of personal property within the State; that the transportation of the cattle ceased after purchase from the commission men; that the cattle were not held by Blasius for the purpose of promoting their safe or convenient transit but were purchased and held by him because he desired to make a profit at their resale; that they were held at his pleasure and that he would sell to anyone, resident or nonresident, who was the highest bidder; that Blasius did not buy the cattle for the purpose of

export or shipment to another State; and that after their purchase by him, and until resold, the cattle were "at absolute and complete rest in the yards at South St. Paul" and "were a part of the general mass of cattle in the State and locally owned." The court also found that the cattle were "handled by the defendant as part of the chain of title from the original producer thereof to the final consumer thereof," and that such handling was "a necessary factor in the center of a chain of commerce from West to the East and South."

The dealings at the South St. Paul Stockyards including the transactions of Blasius, as described in these findings, manifestly were so related to a current of commerce among the States as to be subject to the power of regulation vested in the Congress. Applying the cardinal principle that interstate commerce as contemplated by the Constitution "is not a technical legal conception, but a practical one, drawn from the course of business," this Court said, in *Swift & Co. v. United States*, 196 U.S. 375, 398, 399: "When cattle are sent for sale from a place in one State with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stock yards, and when this is a typical, constantly recurring course, the stock thus existing is a current of commerce among the States, and the purchase of the cattle is a part and incident of such commerce."

But because there is a flow of interstate commerce which is subject to the regulating power of the Congress, it does not necessarily follow that, in the absence of a conflict with the exercise of that power, a State may not lay a nondiscriminatory tax upon property which, although connected with that flow as a general course of business, has come to rest and has acquired a situs within the State. The distinction was recognized in *Stafford v. Wallace*, 258 U.S. 525, 526, where the Court cited, as an illustration, the case of *Bacon v. Illinois*, 227 U.S. 504, (516:) "The question (that is, as to the validity of the state tax), it should be observed, is not with respect to the extent of the power of Congress to regulate interstate commerce, but whether a particular exercise of state power, in view of its nature and operation, must be deemed to be in conflict with this paramount authority."

The States may not impose direct burdens upon interstate commerce; that is, they may not regulate or restrain that which from its nature should be under the control of the one authority and be free from restriction save as it is governed in the manner that the national legislature constitutionally ordains. This limitation applies to the exertion of the State's taxing power as well as to any other interference by the State with the essential freedom of interstate commerce. Thus, the States cannot tax interstate commerce, either by laying the tax upon the business

which constitutes such commerce or the privilege of engaging in it, or upon the receipts, as such, derived from it. Similarly, the States may not tax property in transit in interstate commerce. But, by reason of a break in the transit, the property may come to rest within a State and become subject to the power of the State to impose a non-discriminatory property tax. Such an exertion of state power belongs to that class of cases in which, by virtue of the nature and importance of local concerns, the State may act until Congress, if it has paramount authority over the subject, substitutes its own regulation. The "crucial question," in determining whether the State's taxing power may thus be exerted, is that of "continuity of transit." *Carson Petroleum Co. v. Vial*, 279 U.S. 95, 101.

If the interstate movement has not begun, the mere fact that such a movement is contemplated does not withdraw the property from the State's power to tax it. *Coe v. Errol*, 116 U.S. 517; *Diamond Match Co. v. Ontonagon*, 188 U.S. 82. If the interstate movement has begun, it may be regarded as continuing, so as to maintain the immunity of the property from state taxation, despite temporary interruptions due to the necessities of the journey or for the purpose of safety and convenience in the course of the movement. . . . Formalities, such as the forms of billing, and mere changes in the method of transportation, do not affect the continuity of the transit. The question is always one of substance, and in each case it is necessary to consider the particular occasion or purpose of the interruption during which the tax is sought to be levied. . . . The mere power of the owner to divert the shipment already started does not take it out of interstate commerce if it appears "that the journey has already begun in good faith and temporary interruption of the passage is reasonable and in furtherance of the intended transportation." *Hughes Bros. Co. v. Minnesota*, 272 U.S. 469, 476.

Where property has come to rest within a State, being held there at the pleasure of the owner, for disposal or use, so that he may dispose of it either within the State, or for shipment elsewhere, as his interest dictates, it is deemed to be a part of the general mass of property within the State and is thus subject to its taxing power. In *Brown v. Houston*, 114 U.S. 622, coal mined in Pennsylvania and sent by water to New Orleans to be sold there in the open market was held to have "come to its place of rest, for final disposal or use," and to be "a commodity in the market of New Orleans," and thus to be subject to taxation under the general laws of the State; although the property might, after arrival, be sold from the vessel on which the transportation was made for the purpose of shipment to a foreign port. . . . In *General Oil Co. v. Crain*, 209 U.S. 211, the company conducted an oil business at Memphis where it gathered oil from the North and maintained an establishment for its distribution. Part of the oil was deposited in a tank, appropriately marked

for distribution in smaller vessels in order to fill orders for oil already sold in Arkansas, Louisiana, and Mississippi. The Court held that the first shipment had ended, that the storage of the oil at Memphis for division and distribution to various points was "for the business purposes and profit of the company," and that the tank at Memphis had thus become a depot in its oil business for preparing the oil for another interstate journey. This decision followed the principle announced in *American Steel & Wire Co. v. Speed*, 192 U.S. 500. . . .

In *Bacon v. Illinois*, *supra*, Bacon, the owner of the grain and the taxpayer, had bought it in the South and had secured the right from the railroads transporting it to remove it to his private grain elevator for the purpose of inspecting, weighing, grading, mixing, etc. He had power to change its ownership, consignee, or destination, or to restore the grain, after the processes above mentioned, to the carrier to be delivered at destination in another State according to his original intention. The Court held that, whatever his intention, the grain was at rest within his complete power of disposition, and was taxable; that "it was not being actually transported, and it was not held by carriers for transportation"; that the purpose of the withdrawal from the carriers "did not alter the fact that it had ceased to be transported and had been placed in his hands"; that he had "the privilege of continuing the transportation under the shipping contracts, but of this he might avail himself or not, as he saw fit." What he had done was to establish a "local facility in Chicago for his own benefit, and while, through its employment, the grain was there at rest, there was no reason why it should not be included with his other property within the State in an assessment for taxation which was made in the usual way, without discrimination." *Id.*, 227 U.S. 516. . . .

The case of *Blasius* is a stronger one for the state tax than that of *Bacon*. Here the original shipment was not suspended; it was ended. That shipment was to the South St. Paul Stockyards for sale on that market. That transportation had ceased, and the cattle were sold on that market to *Blasius*, who became absolute owner and was free to deal with them as he liked. He could sell the cattle within the State or for shipment outside the State. He placed them in pens and cared for them awaiting such disposition as he might see fit to make for his own profit. The tax was assessed on the regular tax day while *Blasius* thus owned and possessed them. The cattle were not held by him for the purpose of promoting their safe or convenient transit. They were not in transit. Their situs was in Minnesota where they had come to rest. There was no federal right to immunity from the tax.

A. L. A. SCHECHTER POULTRY CORP. v. UNITED STATES.

Supreme Court of the United States. 1935.
295 U.S. 495.

MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court.

Third. The question of the application of the provisions of the Live Poultry Code to intrastate transactions. . . . This aspect of the case presents the question whether the particular provisions of the Live Poultry Code, which the defendants were convicted of violating and for having conspired to violate, were within the regulating power of Congress.

These provisions relate to the hours and wages of those employed by defendants in their slaughterhouses in Brooklyn and to the sales there made to retail dealers and butchers.

(1) Were these transactions "*in*" interstate commerce? Much is made of the fact that almost all the poultry coming to New York is sent there from other States. But the code provisions, as here applied, do not concern the transportation of the poultry from other States to New York, or the transactions of the commission men or others to whom it is consigned, or the sales made by such consignees to defendants. When defendants had made their purchases, whether at the West Washington Market in New York City or at the railroad terminals serving the City, or elsewhere, the poultry was trucked to their slaughterhouses in Brooklyn for local disposition. The interstate transactions in relation to that poultry then ended. Defendants held the poultry at their slaughterhouse markets for slaughter and local sale to retail dealers and butchers who in turn sold directly to consumers. Neither the slaughtering nor the sales by defendants were transactions in interstate commerce. . . .

The undisputed facts thus afford no warrant for the argument that the poultry handled by defendants at their slaughterhouse markets was in a "*current*" or "*flow*" of interstate commerce and was thus subject to congressional regulation. The mere fact that there may be a constant flow of commodities into a State does not mean that the flow continues after the property has arrived and has become commingled with the mass of property within the State and is there held solely for local disposition and use. So far as the poultry here in question is concerned, the flow in interstate commerce had ceased. The poultry had come to a permanent rest within the State. It was not held, used, or sold by defendants in relation to any further transactions in interstate commerce and was not destined for transportation to other States. Hence, decisions which deal

with a stream of interstate commerce—where goods come to rest within a State temporarily and are later to go forward in interstate commerce—and with the regulations of transactions involved in that practical continuity of movement, are not applicable here. . . .

(2) Did the defendants' transactions directly "*affect*" interstate commerce so as to be subject to federal regulation? The power of Congress extends not only to the regulation of transactions which are part of interstate commerce, but to the protection of that commerce from injury. It matters not that the injury may be due to the conduct of those engaged in intrastate operations. . . .

The instant case is not of that sort. This is not a prosecution for a conspiracy to restrain or monopolize interstate commerce in violation of the Anti-Trust Act. . . .

In determining how far the federal government may go in controlling intrastate transactions upon the ground that they "*affect*" interstate commerce, there is a necessary and well-established distinction between direct and indirect effects. The precise line can be drawn only as individual cases arise, but the distinction is clear in principle. Direct effects are illustrated by the railroad cases . . . as *e. g.*, the effect of failure to use prescribed safety appliances on railroads which are the highways of both interstate and intrastate commerce, injury to an employee engaged in interstate transportation by the negligence of an employee engaged in an intrastate movement, the fixing of rates for intrastate transportation which unjustly discriminate against interstate commerce. But where the effect of intrastate transactions upon interstate commerce is merely indirect, such transactions remain within the domain of state power. . . .

The distinction between direct and indirect effects has been clearly recognized in the application of the Anti-Trust Act. Where a combination or conspiracy is formed, with the intent to restrain interstate commerce or to monopolize any part of it, the violation of the statute is clear. . . . But where that intent is absent, and the objectives are limited to intrastate activities, the fact that there may be an indirect effect upon interstate commerce does not subject the parties to the federal statute, notwithstanding its broad provisions. This principle has frequently been applied in litigation growing out of labor disputes. . . .

While these decisions relate to the application of the federal statute, and not to its constitutional validity, the distinction between direct and indirect effects of intrastate transactions upon interstate commerce must be recognized as a fundamental one, essential to the maintenance of our constitutional system. . . . We must consider the provisions here in question in the light of this distinction.

The question of chief importance relates to the provisions of the Code as to the hours and wages of those employed in defendants' slaughter-

house markets. It is plain that these requirements are imposed in order to govern the details of defendants' management of their local business. The persons employed in slaughtering and selling in local trade are not employed in interstate commerce. The question of how many hours these employees should work and what they should be paid differs in no essential respect from similar questions in other local businesses which handle commodities brought into a State and there dealt in as a part of its internal commerce. This appears from an examination of the considerations urged by the Government with respect to conditions in the poultry trade. Thus, the Government argues that hours and wages affect prices; that slaughterhouse men sell at a small margin above operating costs; that labor represents 50 to 60 per cent. of these costs; that a slaughterhouse operator paying lower wages or reducing his cost by exacting long hours of work, translates his saving into lower prices; that this results in demands for a cheaper grade of goods; and that the cutting of prices brings about a demoralization of the price structure. Similar conditions may be adduced in relation to other businesses. The argument of the Government proves too much. If the federal government may determine the wages and hours of employees in the internal commerce of a State, because of their relation to cost and prices and their indirect effect upon interstate commerce, it would seem that a similar control might be exercised over other elements of cost, also affecting prices, such as the number of employees, rents, advertising, methods of doing business, etc. All the processes of production and distribution that enter into cost could likewise be controlled. If the cost of doing an intrastate business is in itself the permitted object of federal control, the extent of the regulation of the cost would be a question of discretion and not of power.

The Government also makes the point that efforts to enact state legislation establishing high labor standards have been impeded by the belief that unless similar action is taken generally, commerce will be diverted from the States adopting such standards, and that this fear of diversion has led to demands for federal legislation on the subject of wages and hours. The apparent implication is that the federal authority under the commerce clause should be deemed to extend to the establishment of rules to govern wages and hours in intrastate trade and industry generally throughout the country, thus overriding the authority of the States to deal with domestic problems arising from labor conditions in their internal commerce.

It is not the province of the Court to consider the economic advantages or disadvantages of such a centralized system. It is sufficient to say that the Federal Constitution does not provide for it. Our growth and development have called for wide use of the commerce power of the federal government in its control over the expanded activities of inter-

state commerce, and in protecting that commerce from burdens, interferences, and conspiracies to restrain and monopolize it. But the authority of the federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between "commerce among the several States" and the internal concerns of a State. The same answer must be made to the contention that is based upon the serious economic situation which led to the passage of the Recovery Act,—the fall in prices, the decline in wages and employment, and the curtailment of the market for commodities. Stress is laid upon the great importance of maintaining wage distributions which would provide the necessary stimulus in starting "the cumulative forces making for expanding commercial activity." Without in any way disparaging this motive, it is enough to say that the recuperative efforts of the federal government must be made in a manner consistent with the authority granted by the Constitution. . . .

MR. JUSTICE CARDOZO, concurring. . . .

If this code had been adopted by Congress itself, and not by the President on the advice of an industrial association, it would even then be void unless authority to adopt it is included in the grant of power "to regulate commerce with foreign nations and among the several states."

. . . . There is a view of causation which would obliterate the distinction between what is national and what is local in the activities of commerce. Motion at the outer rim is communicated perceptibly, though minutely, to recording instruments at the center. A society such as ours "is an elastic medium which transmits all tremors throughout its territory; the only question is of their size." Per Learned Hand, J., in the court below. The law is not indifferent to considerations of degree. Activities local in their immediacy do not become interstate and national because of distant repercussions. What is near and what is distant may at times be uncertain. There is no penumbra of uncertainty obscuring judgment here. To find immediacy or directness here is to find it almost everywhere. . . .

To take from this code the provisions as to wages and hours of labor is to destroy it altogether. There is no opportunity in such circumstances for the severance of the infected parts in the hope of saving the remainder.

I am authorized to state that MR. JUSTICE STONE joins in this opinion.

*Commerce as Business*SWIFT AND COMPANY *v.* UNITED STATES.

Supreme Court of the United States. 1905.
196 U.S. 375.

MR. JUSTICE HOLMES delivered the opinion of the court. . . .

To sum up the bill more shortly, it charges a combination of a dominant proportion of the dealers in fresh meat throughout the United States not to bid against each other in the five stock markets of the different States, to bid up prices for a few days in order to induce the cattle men to send their stock to the stockyards, to fix prices at which they will sell, and to that end to restrict shipments of meat when necessary, to establish a uniform rule of credit to dealers and to keep a blacklist, to make uniform and improper charges for cartage, and finally, to get less than lawful rates from the railroads to the exclusion of competitors. It is true that the last charge is not clearly stated to be a part of the combination. . . . But after all the specific charges there is a general allegation that the defendants are conspiring with one another, the railroads and others, to monopolize the supply and distribution of fresh meats throughout the United States, etc., as has been stated above, and it seems to us that this general allegation of intent colors and applies to all the specific charges of the bill. . . . Thus read this bill seems to us intended to allege successive elements of a single connected scheme. . . .

The general objection is urged that the bill does not set forth sufficient definite or specific facts. This objection is serious, but it seems to us inherent in the nature of the case. The scheme alleged is so vast that it presents a new problem in pleading. If, as we must assume, the scheme is entertained, it is, of course, contrary to the very words of the statute. Its size makes the violation of the law more conspicuous, and yet the same thing makes it impossible to fasten the principal facts to a certain time and place. The elements, too, are so numerous and shifting . . . that something of the same impossibility applies to them. The law has been upheld, and therefore we are bound to enforce it notwithstanding these difficulties. On the other hand, we are equally bound by the first principles of justice not to sanction a decree so vague as to put the whole conduct of the defendants' business at the peril of a summons for contempt. We must steer between these opposite difficulties as best we can.

The scheme as a whole seems to us to be within reach of the law. The constituent elements, as we have stated them, are enough to give to

the scheme a body and, for all that we can say, to accomplish it. . . . It is suggested that the several acts charged are lawful and that intent can make no difference. But they are bound together as the parts of a single plan. The plan may make the parts unlawful. *Aikens v. Wisconsin*, 195 U.S. 194, 206. . . . Intent is almost essential to such a combination and is essential to such an attempt. Where acts are not sufficient in themselves to produce a result which the law seeks to prevent—for instance, the monopoly—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen. *Commonwealth v. Peaslee*, 177 Mass. 267, 272. But when that intent and the consequent dangerous probability exists, this statute, like many others and like the common law in some cases, directs itself against that dangerous probability as well as against the completed result. . . . The unity of the plan embraces all the parts.

One further observation should be made. Although the combination alleged embraces restraint and monopoly of trade within a single State, its effect upon commerce among the States is not accidental, secondary, remote or merely probable. On the allegations of the bill the latter commerce no less, perhaps even more, than commerce within a single State is an object of attack. . . . Moreover, it is a direct object, it is that for the sake of which the several specific acts and courses of conduct are done and adopted. Therefore the case is not like *United States v. E. C. Knight Co.*, 156 U.S. 1, where the subject matter of the combination was manufacture and the direct object monopoly of manufacture within a State. However likely monopoly of commerce among the States in the article manufactured was to follow from the agreement it was not a necessary consequence nor a primary end. Here the subject matter is sales and the very point of the combination is to restrain and monopolize commerce among the States in respect of such sales. The two cases are near to each other, as sooner or later always must happen where lines are to be drawn, but the line between them is distinct. *Montague & Co. v. Lowry*, 193 U.S. 38.

So, again, the line is distinct between this case and *Hopkins v. United States*, 171 U.S. 578. All that was decided there was that the local business of commission merchants was not commerce among the States, even if what the brokers were employed to sell was an object of such commerce. The brokers were not like the defendants before us, themselves the buyers and sellers. They only furnished certain facilities for the sales. Therefore, there again the effects of the combination of brokers upon the commerce was only indirect and not within the act. Whether the case would have been different if the combination had resulted in exorbitant charges, was left open. . . .

So far it has not been necessary to consider whether the facts charged in any single paragraph constitute commerce among the States or show an interference with it. . . . We pass now to the particulars. . . . The purchasers and their slaughtering establishments are largely in different States from those of the stock yards, and the sellers of the cattle, perhaps it is not too much to assume, largely in different States from either. . . .

It is said that this charge was too vague and that it does not set forth a case of commerce among the States. Taking up the latter objection first, commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business. When cattle are sent for sale from a place in one State, with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stock yards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the States, and the purchase of the cattle is a part and incident of such commerce. . . . It is immaterial if the section also embraces domestic transactions.

It should be added that the cattle in the stock yard are not at rest. . . .

The injunction, however, refers not to trade among the States in cattle, concerning which there can be no question of original packages, but to trade in fresh meats, as the trade forbidden to be restrained, and it is objected that the trade in fresh meats . . . is not commerce among the States, because the meat is sold at the slaughtering places, or when sold elsewhere may be sold in less than the original packages. But the allegations . . . also import that the sales are to persons in other States, and that the shipments to other States are part of the transaction—"pursuant to such sales"— . . . Moreover, the sales are by persons in one State to persons in another. . . .

. . . . The defendants cannot be ordered to compete, but they properly can be forbidden to give directions or to make agreements not to compete. See *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211. . . .

DAHNKE-WALKER MILLING CO. *v.* BONDURANT.

Supreme Court of the United States. 1921.
257 U.S. 282.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This was an action to recover damages for the breach of a contract for the sale and delivery of a crop of wheat estimated at 14,000 bushels. The plaintiff was a Tennessee corporation engaged in operating a flour

and feed mill at Union City, in that State. The defendant was a resident of Hickman, Kentucky, and extensively engaged in farming in that vicinity. They were the parties to the contract. It was made at Hickman and the wheat was to be delivered and paid for there. But the delivery was to be on board the cars of a common carrier, and the plaintiff intended to ship the wheat to its mill in Tennessee. A small part of the crop was delivered as agreed, but delivery of the rest was refused, although the plaintiff was prepared and expecting to receive and pay for it. A payment advanced on the crop more than covered what was delivered. At the time for delivery wheat had come to be worth several cents per bushel more than the price fixed by the contract. The action was brought in a state court in Kentucky.

The principle defense interposed was to the effect that the plaintiff had not complied, as was the fact, with a statute of Kentucky prescribing the conditions on which corporations of other States might do business in that State, and that the contract was therefore not enforceable. To this the plaintiff replied that the only business done by it in Kentucky consisted in purchasing wheat and other grain in that State for immediate shipment to its Tennessee mill and then shipping the same there; that the contract in question was made in the course of this business and with the purpose of forwarding the wheat to the mill as soon as it was delivered on board the cars; that this transaction was in interstate commerce and as to it the statute of Kentucky whose application was invoked by the defendant was invalid because in conflict with the commerce clause of the Constitution of the United States. . . .

The commerce clause of the Constitution expressly commits to Congress and impliedly withholds from the several States the power to regulate commerce among the latter. Such commerce is not confined to transportation from one State to another, but comprehends all commercial intercourse between different States and all the component parts of that intercourse. Where goods in one State are transported into another for purposes of sale the commerce does not end with the transportation, but embraces as well the sale of the goods after they reach their destination and while they are in the original packages. . . . On the same principle, where goods are purchased in one State for transportation to another the commerce includes the purchase quite as much as it does the transportation. . . . In no case has the court made any distinction between buying and selling or between buying for transportation to another State and transporting for sale in another State. Quite to the contrary, the import of the decisions has been that if the transportation was incidental to buying or selling it was not material whether it came first or last.

A corporation of one State may go into another, without obtaining

the leave or license of the latter, for all the legitimate purposes of such commerce; and any statute of the latter State which obstructs or lays a burden on the exercise of this privilege is void under the commerce clause. . . .

There is no controversy about the facts bearing on the character of the transaction in question. It had been the practice of the plaintiff to go into Kentucky to purchase grain to be transported to and used in its mill in Tennessee. On different occasions it had purchased from the defendant—at one time 13,000 bushels of corn. This contract was made in continuance of that practice, the plaintiff intending to forward the grain to its mill as soon as the delivery was made. In keeping with that purpose the delivery was to be made on board the cars of a public carrier. Applying to these facts the principles before stated, we think the transaction was in interstate commerce. . . .

MR. JUSTICE BRANDEIS, with whom concurred MR. JUSTICE CLARKE, dissenting. . . .

STAFFORD V. WALLACE.

Supreme Court of the United States. 1922.

258 U.S. 495.

These cases involve the constitutionality of the "Packers and Stockyards Act, of 1921," . . . so far as that act provides for the supervision by federal authority of the business of the commission men and of the live-stock dealers in the great stock-yards of the country. . . . The bills sought to restrain enforcement of orders of the Secretary of Agriculture. . . .

The two bills in substance allege that the Union Stock Yards & Transit Company was incorporated by the State of Illinois in 1865 . . . that it is the largest stockyards in the world, and in 1920 handled fifteen million head of live-stock of all descriptions, . . . shipped mainly from outside the State of Illinois; that the live-stock are loaded at the point of origin and shipped under a shipping contract which is a straight bill of lading consigning them to the commission merchants at the yard, that on arrival the live-stock are at once driven from the cars by the commission merchant, . . . that they are then in the exclusive possession of the commission merchant, . . . that with the delivery to the commission merchant, the transportation is completely ended, . . . that all the live-stock . . . are sold at the stock yards and nowhere else; . . . that the commission men remit to the owners and shippers the proceeds of sale, less their commission and the freight and yard charges paid by them; that

the live-stock are sold (1) to purchasers who buy the same for slaughter at packing houses, located at the stockyards or adjacent thereto; (2) to purchasers who buy to ship to packing houses outside the State of Illinois for slaughter; (3) to purchasers who buy to feed and fatten the same; and (4) to dealers or traders. . . .

It appeared from the data before the Committee [of Agriculture of the House of Representatives] that for more than two decades it had been charged that the five great packing establishments of Swift, Armour, Cudahy, Wilson and Morris, called the "Big Five," were engaged in a conspiracy in violation of the Anti-Trust Law, to control the business of the purchase of the live-stock, their preparation for use in meat products, and the distribution and sale thereof. . . . [The Federal Trade] Commission reported that the "Big Five" packing firms had complete control of the trade from the producer to the consumer, had eliminated competition, and that one of the essential means by which this was made possible was their ownership of a controlling part of the stock in the stockyards companies of the country. . . .

MR. CHIEF JUSTICE TAFT delivered the opinion of the court. . . .

The object to be secured by the act is the free and unburdened flow of live-stock from the ranges and farms of the West and the Southwest through the great stockyards and slaughtering centers on the borders of that region, and thence in the form of meat products to the consuming cities of the country in the Middle West and East, or, still as live-stock, to the feeding places and fattening farms in the Middle West or East for further preparation for the market.

The chief evil feared is the monopoly of the packers, enabling them unduly and arbitrarily to lower prices to the shipper who sells, and unduly and arbitrarily to increase the price to the consumer who buys. Congress thought that the power to maintain this monopoly was aided by control of the stockyards. Another evil which it sought to provide against by the act, was exorbitant charges, duplication of commissions, deceptive practices in respect of prices, in the passage of the live-stock through the stockyards, all made possible by collusion between the stockyards management and the commission men, on the one hand, and the packers and dealers on the other. . . .

The stockyards are not a place of rest or final destination. . . . The stockyards are but a throat through which the current flows, and the transactions which occur therein are only incident to this current from the West to the East, and from one State to another. Such transactions cannot be separated from the movement to which they contribute and necessarily take on its character. . . . The sales are not in this aspect

merely local transactions. They create a local change of title, it is true, but they do not stop the flow; they merely change the private interests in the subject of the current, not interfering with, but, on the contrary, being indispensable to its continuity. . . .

The act, therefore, treats the various stockyards of the country as great national public utilities to promote the flow of commerce from the ranges and farms of the West to the consumers in the East. It assumes that they conduct a business affected by a public use of a national character and subject to national regulation. That it is a business within the power of regulation by legislative action needs no discussion. That has been settled since the case of *Munn v. Illinois*, 94 U.S. 113. Nor is there any doubt that in the receipt of live stock by rail and in their delivery by rail the stockyards are an interstate commerce agency. . . . The only question here is whether the business done in the stockyards between the receipt of the live stock in the yards and the shipment of them therefrom is a part of interstate commerce, or is so associated with it as to bring it within the power of national regulation. A similar question has been before this court and had great consideration in *Swift & Co. v. United States*, 196 U.S. 375. . . .

The application of the commerce clause of the Constitution in the *Swift Case* was the result of the natural development of interstate commerce under modern conditions. . . .

The principles of the *Swift Case* have become a fixed rule of this court in the construction and application of the commerce clause. . . .

. . . . The reasonable fear by Congress that such acts, usually lawful and affecting only intrastate commerce when considered alone, will probably and more or less constantly be used in conspiracies against interstate commerce or constitute a direct and undue burden on it, expressed in this remedial legislation, serves the same purpose as the intent charged in the *Swift* indictment to bring acts of a similar character into the current of interstate commerce for federal restraint. Whatever amounts to more or less constant practice, and threatens to obstruct or unduly to burden the freedom of interstate commerce is within the regulatory power of Congress under the commerce clause, and it is primarily for Congress to consider and decide the fact of the danger and meet it. This court will certainly not substitute its judgment for that of Congress in such a matter unless the relation of the subject to interstate commerce and its effect upon it are clearly non-existent. . . .

MR. JUSTICE McREYNOLDS dissents.

MR. JUSTICE DAY did not sit in these cases and took no part in their decision.

CHICAGO BOARD OF TRADE *v.* OLSEN, 262 U.S. 1 (1922). The bill of the plaintiffs avers that the Board does no business in selling or buying grain, but only furnishes an exchange and offices where such business can be done by its members; that it does not deliver any market quotation through interstate means, but it does cause to be collected the first price and each change of price on its exchange in cash and future sales during the regular hours in the exchange hall and delivers them to certain telegraph companies, who pay the Board for this information.

The bill further avers that the members of its exchange engage only in three kinds of trading. (1) Many act as commission merchants and receive from producers and country grain dealers grain in cars and boats consigned to them which as agents they sell for immediate delivery. . . .

(2) Many members send out in the afternoons whenever market conditions are favorable, telegrams or letters to country grain dealers offering to buy grain, or to millers and other non-residents of Chicago, probable buyers, offering to sell grain at released prices and to be shipped within a certain time. . . .

(3) Many of the members engage either as principals or agents in making on the exchange contracts with other members for the purchase and sale of grain for future delivery by which the seller agrees to deliver in Chicago the grain covered by the contract. . . . More than 75 per cent. of the volume of all trading in the exchange is for future delivery. . . .

The bill further avers that all contracts for future delivery are fulfilled only by delivery of warehouse receipts for the grain issued by twelve warehouses in Chicago that the grain is mixed with other grain so that the receipt holder never gets the grain deposited when the receipt was issued; that in the trading for future delivery more than three-quarters of the many millions of bushels contracted to be delivered are settled for without delivery by offsetting purchases. . . .

The bill further avers that another large part of future trading is done by speculators, so-called, who make a study of the market conditions affecting prices, and try to profit by their judgment as to future prices that six-sevenths of all the trading in futures in the country take place in Chicago. . . .

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court. . . .

The Chicago Board of Trade is the greatest grain market in the world. . . . The railroads of the country accommodate themselves to the interstate function of the Chicago market by giving shippers from western States bills of lading through Chicago to points in eastern States with the right to remove the grain at Chicago for temporary pur-

poses. . . . The fact that the grain shipped from the west and taken from the cars have been stored in warehouses and mixed with other grain, so that the owner receives other grain when presenting his receipt for continuing the shipment, does not take away from the interstate character of the through shipment. . . .

It is impossible to distinguish the case at bar, so far as it concerns the cash grain, the sales to arrive, and the grain actually delivered in fulfillment of future contracts, from the current of stock shipments declared to be interstate commerce in *Stafford v. Wallace*, 258 U.S. 495. . . .

This case was but the necessary consequence of the conclusions reached in the case of *Swift & Co. v. United States*, 196 U.S. 375. That case was a milestone in the interpretation of the commerce clause of the Constitution. It recognized the great changes and development in the business of this vast country and drew again the dividing line between interstate and intrastate commerce where the Constitution intended it to be. It refused to permit local incidents of great interstate movement, which taken alone were intrastate, to characterize the movement as such. The *Swift Case* merely fitted the commerce clause to the real and practical essence of modern business growth. It applies to the case before us just as it did in *Stafford v. Wallace*. . . .

The question under this act is somewhat different in form and detail from that in the *Stafford Case*, but the result must be the same. It is not the sales and deliveries of the actual grain which are the chief subject of the supervision of federal agency by Congress in the Grain Futures Act. . . . It is the contracts of sales of grain for future delivery, most of which do not result in actual delivery but are settled by offsetting them with other contracts of the same kind, or by what is called "ringing." . . . The question is whether the conduct of such sales is subject to constantly recurring abuses which are a burden and obstruction to interstate commerce in grain? And further, are they such an incident of that commerce and so intermingled with it that the burden and obstruction caused therein by them can be said to be direct? . . .

It is clear from the citations, in the statement of the case, of evidence before committees of investigation as to manipulations of the futures market and their effect, that we would be unwarranted in rejecting the finding of Congress as unreasonable, and that . . . we must accept the view that such manipulation does work to the detriment of producers, consumers, shippers and legitimate dealers in interstate commerce in grain and that it is a real abuse. . . .

MR. JUSTICE McREYNOLDS and MR. JUSTICE SUTHERLAND dissent.

CHAPTER IX

The Regulation of Monopolies

THE SUPREME COURT AND THE TRUSTS

The Sherman Anti-Trust Act was the governmental response in the federal sphere to the intense Western hostility to the Eastern "moneyed interests" which dominated the politics of the final quarter of the last century and which culminated in the nomination of William Jennings Bryan of Nebraska for the Presidency on the Democratic ticket in 1896. It was during this period that the great general principles controlling state regulation of private enterprise were laid down by the Supreme Court. In particular, the railroad corporations were established in the law as common carriers, and private business was held able to commit acts which the state might either control or prohibit in the interest of the public welfare. The federal government was drawn into activity with the States on both these subjects during the nineties.

In each field, congressional regulation took the obvious course. For the railroads, this meant control by the Interstate Commerce Commission, in order to end the chaotic situation presented by the diversification of transportation charges which state regulation had created. The Supreme Court felt no especial difficulty in supporting Congress because the railroad systems of the country clearly overlapped state boundaries. The doctrine of the rate-making cases was, as has been seen, geared to this fundamental fact-situation. For the regulation of Big Business, the obvious course to be pursued was to disintegrate the great corporate units of the business world; or, as the phrase of the times went, to dissolve the trusts.

The combination of competing business units under single management has been a characteristic of modern industrialism. The tendency of both industry and commerce in the supervision of production, distribution and marketing ("merchandising") has been towards concentration of control at the top with diffusion of ownership at the bottom. The great corporations have been formed on more than one pattern as they have been pursued by the federal government. They have, however, remained constant to certain objectives: the elimination of competitors; the reduction of the costs of production; the concentration of financial strength; and the control of prices. The interdependence

of these factors in successful large-scale business has itself fostered the process of consolidation.

The structural design of the corporation has been in some instances horizontal, as in the case of General Motors early in the century—that is, it has been built up in order to absorb competing products, and then thereafter to offer to the public a full price range within its field. In other instances, as in that of Ford, the organization has been perpendicular—it has followed the plan of securing all the resources and all the mechanical facilities necessary to provide for the manufacture of its product. In still other cases the desired control has been reached by a species of industrial federalism, under which allied manufacturers or producers on the one hand, or their boards of managers on the other, have retained a predetermined measure of autonomy and have pooled their mutual interests through the medium of some common directorate. Finally, from this form of combination (which has frequently been unable to meet strong stresses on its capital structure) there has evolved a financial dictatorship depending for its power on the possession of a controlling share of the stocks of the companies merged.

The purpose of these comments is not to outline the causes and manifestations of combinations to control interstate commerce,¹ but to indicate the nature of the problem with which the federal antitrust policy had to cope. This whole problem was thrust into the lap of the Supreme Court as soon as the federal policy began to issue in litigation.

At the start, the Court took up the legal problem of monopoly at about the point where the state anti-trust legislation had left it. That was the situation when *United States v. E. C. Knight Co.* came to be tried. The federal government had slated the American Sugar Refining Company for dissolution. That corporation had been formed by the purchase of stock of enough sugar refineries to give the combine practical control of the cane-sugar refining industry. The Knight Company was one of its subsidiaries. It was assumed that the buying and selling of stock was protected by the common law right to dispose of one's private property as one saw fit, short of direct injury to the public interest. If this type of transaction could not be reached by the law of contracts, then the prevention of the resulting monopoly could be secured only by controlling the movement of the products of the corporation resulting from the merger. This line of attack brought the case well within the traditional application of the commerce clause. The *Trans-Missouri Freight Association* case illustrates a type of contract

¹ For a brilliant analysis of the process of consolidation, see the two consecutive articles on trusts by Paul T. Homan and Myron W. Watkins in the *Encyclopaedia of the Social Sciences*, XV, 115 ff.

which could be prohibited. What was in issue there was simply an agreement between competitors to maintain a prescribed rate level. The Court held in sharp language that the association was illegal under the Sherman Act. In the same year it broadened the position there taken by holding illegal a combination of steel manufacturers on the ground that Congress had power under the commerce clause to prohibit the performance of *any* contract between corporations which operated directly to regulate substantially interstate commerce. This line of cases is brought to a conclusion by the epoch-making decision in *Northern Securities Co. v. United States*, ordering the dissolution of a holding company. The issue here was the legality of the transfer and exchange of certain railway stock, held by the shareholders of two competing railroads, for shares in a third corporation organized under the laws of New Jersey for the purpose of receiving the railroad stock. It was thought that the reasoning in the *Knight* case covered this deal, and that there was no threat to it from the existing anti-trust cases. Mr. Justice Harlan, however, in language as sweeping as any ever used by the Court, and in an opinion crowded with italics, held that the Sherman Act embraced "every contract, combination or conspiracy, in whatever form, of whatever nature, and whoever may be parties to it," which would "extinguish competition." In terms the decision applied to railroads; but in principle, to trade also.

Like the zoning laws which operate to create new forms of architecture, the *Northern Securities* decision gave new forms to corporate combination. Chief of these was the trust. This form of organization was not new, for Standard Oil had been organized in 1882, twelve years before holding companies were brought within reach of the law. It became now, however, the refuge of the harried combines, and remained so until 1911, the year of the dissolution of Standard Oil and the American Tobacco Co.

Standard Oil Co. v. United States opens the next period of the anti-trust cases. A number of the early decisions under the Sherman Act had been close and prolific of debate. The point in controversy was not the constitutionality of that act. It was, rather, whether the act prohibited all combinations in restraint of trade, or only combinations which restrained trade unreasonably. The members of the Court did not divide on the issue of governmental regulation. They all seem to have shared the economic laissez-faire theory of the times and to have believed in the salutary results of free competition. They divided, at bottom, on the question whether or not the Court should charge itself with the function of judicial legislation. What was in debate was a difference in the view of the rôle of the judiciary. The controversy opened with the *Trans-Missouri Freight Association* case, with a minority favoring the

restriction of the Sherman Act to unreasonable restraints of trade. It closed with the *Standard Oil* case, when Chief Justice White, speaking for the Court, interpolated the word "unreasonable" in the Sherman Act, before the word "restraint." By this practical legislation the Supreme Court assumed control over the whole problem presented by the large-scale organization of Big Business. From that time on it was able to preserve "good" trusts and to condemn to disintegration "bad" trusts in the face of the record of restraint; and it proceeded to do so.

The Court had also at its disposal the principle of the *Swift & Co.* case, enlarging the concept of commerce to include the course of business. That principle was carefully tested in a series of cases both before and after the great affirmation of *Stafford v. Wallace. United States v. Terminal Railroad Ass'n of St. Louis*, 224 U.S. 383 (1912); *United States v. Winslow*, 227 U.S. 202 (1913); *United States v. United Shoe Machinery Co.*, 227 U.S. 32 (1918); and *United States v. United States Steel Corp.*, 251 U.S. 417 (1920). The last two of these cases are given below, in the section on conspiracy. It was developed as an auxiliary doctrine, rather correlative to than coördinate with traditional theory. Correlative, because it was applied only to business in the course of which there was movement across state lines. After the *United States Steel* decision, it lay as it were fallow until the middle thirties, when the severe economic depression of the country, with the concomitant labor troubles, caused the active intervention of Congress along the entire industrial front.

The Rule of Reason

UNITED STATES *v.* E. C. KNIGHT CO.

Supreme Court of the United States. 1895.
156 U.S. 1.

[The Government of the United States charged that the named corporation with four others had contracted with the American Sugar Refining Co. for the purchase by the latter of the stocks and properties of these corporations, and for the issuance in exchange of stock in the American Sugar Refining Co. It was also charged that this transaction was intended to give control of the price of sugar in the United States to the American Sugar Refining Co., together with a monopoly of the manufacture and sale of refined sugar within this country. The Government argued that these contracts violated the Sherman Anti-Trust Act, July 2, 1890, 26 Stat. 209.]

MR. CHIEF JUSTICE FULLER delivered the opinion of the Court.

By the purchase of the stock of the four Philadelphia refineries, with shares of its own stock, the American Sugar Refining Company acquired nearly complete control of the manufacture of refined sugar within the United States. . . .

The fundamental question is, whether conceding that the existence of a monopoly in manufacture is established by the evidence, that monopoly can be directly suppressed under the act of Congress in the mode attempted by this bill. . . .

The argument is that the power to control the manufacture of refined sugar is a monopoly over a necessary of life, to the enjoyment of which by a large part of the population of the United States interstate commerce is indispensable, and that, therefore, the general government in the exercise of the power to regulate commerce may repress such monopoly directly and set aside the instruments which have created it. But this argument cannot be confined to necessities of life merely, and must include all articles of general consumption. Doubtless the power to control the manufacture of a given thing involves in a certain sense the control of its disposition, but this is a secondary and not the primary sense; and although the exercise of that power may result in bringing the operation of commerce into play, it does not control it, and affects it only incidentally and indirectly. Commerce succeeds to manufacture, and is not a part of it. The power to regulate commerce is the power to prescribe the rule by which commerce shall be governed, and is a power independent of the power to suppress monopoly. But it may operate in repression of monopoly whenever that comes within the rules by which commerce is governed or whenever the transaction is itself a monopoly of commerce. . . .

It will be perceived how far-reaching the proposition is that the power of dealing with a monopoly directly may be exercised by the general government whenever interstate or international commerce may be ultimately affected. The regulation of commerce applies to the subjects of commerce and not to matters of internal police. Contracts to buy, sell, or exchange goods to be transported among the several States, the transportation and its instrumentalities, and articles bought, sold or exchanged for the purposes of such transit among the States, or put in the way of transit, may be regulated, but this is because they form part of interstate trade or commerce. The fact that an article is manufactured for export to another State does not of itself make it an article of interstate commerce, and the intent of the manufacturer does not determine the time when the article or product passes from the control of the State and belongs to commerce.

This was so ruled in *Coe v. Errol*, 116 U.S. 517, 525. . . . Mr. Justice Bradley, delivering the opinion of the court, said: "Does the owner's

state of mind in relation to the goods, that is, his intent to export them, and his partial preparation to do so, exempt them from taxation? This is the precise question for solution. . . . There must be a point of time when they cease to be governed exclusively by the domestic law and begin to be governed and protected by the national law of commercial regulation, and that moment seems to us to be a legitimate one for this purpose, in which they commence their final movement from the State of their origin to that of their destination."

And again, in *Kidd v. Pearson*, 128 U.S. 21, 22. . . . And Mr. Justice Lamar remarked: "No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufacture and commerce. Manufacture is transformation—the fashioning of raw materials into a change of form for use. The functions of commerce are different. The buying and selling and the transportation incident thereto constitute commerce; and the regulation of commerce in the constitutional sense embraces the regulation at least of such transportation. . . . If it be held that the term includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that Congress would be invested, to the exclusion of the States, with the power to regulate, not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short, every branch of human industry. For is there one of them that does not contemplate, more or less clearly, an interstate or foreign market? Does not the wheat grower of the Northwest or the cotton planter of the South, plant, cultivate, and harvest his crop with an eye on the prices at Liverpool, New York, and Chicago? The power being vested in Congress and denied to the States, it would follow as an inevitable result that the duty would devolve on Congress to regulate all of these delicate, multiform and vital interests—interests which in their nature are and must be local in all the details of their successful management. . . . Any movement toward the establishment of rules of production in this vast country, with its many different climates and opportunities, could only be at the sacrifice of the peculiar advantages of a large part of the localities in it, if not of every one of them. . . . Nor this alone. Even in the exercise of the power contended for, Congress would be confined to the regulation, not of certain branches of industry, however numerous, but to those instances in each and every branch where the producer contemplated an interstate market. These instances would be almost infinite, as we have seen; but still there would always remain the possibility, and often it would be the case, that the producer contemplated a domestic market. In that case the supervisory

power must be executed by the State; and the interminable trouble would be presented, that whether the one power or the other should exercise the authority in question would be determined, not by any general or intelligible rule, but by the secret and changeable intention of the producer in each and every act of production. A situation more paralyzing to the state governments, and more provocative of conflicts between the general government and the States, and less likely to have been what the framers of the Constitution intended, it would be difficult to imagine." And see *Veazie v. Moore*, 14 How. 568, 574. . . .

Contracts, combinations, or conspiracies to control domestic enterprise in manufacture, agriculture, mining, production in all its forms, or to raise or lower prices or wages, might unquestionably tend to restrain external as well as domestic trade, but the restraint would be an indirect result, however inevitable and whatever its extent, and such result would not necessarily determine the object of the contract, combination, or conspiracy. . . .

It was in the light of well-settled principles that the act of July 2, 1890, was framed. Congress did not attempt thereby to assert the power to deal with monopoly directly as such; or to limit and restrict the rights of corporations created by the States or the citizens of the States in the acquisition, control, or disposition of property; or to regulate or prescribe the price or prices at which such property or the products thereof should be sold; or to make criminal the acts of persons in the acquisition and control of property which the States of their residence or creation sanctioned or permitted. . . . Sugar was refined for sale, and sales were probably made at Philadelphia for consumption, and undoubtedly for resale by the first purchasers throughout Pennsylvania and other States, and refined sugar was also forwarded by the companies to other States for sale. Nevertheless it does not follow that an attempt to monopolize, or the actual monopoly of, the manufacture was an attempt, whether executory or consummated, to monopolize commerce, even though, in order to dispose of the product, the instrumentality of commerce was necessarily invoked. There was nothing in the proofs to indicate any intention to put a restraint upon trade or commerce, and the fact, as we have seen, that trade or commerce might be indirectly affected was not enough to entitle complainants to a decree. The subject-matter of the sale was shares of manufacturing stock. . . .

MR. JUSTICE HARLAN, dissenting. . . .

UNITED STATES *v.* TRANS-MISSOURI FREIGHT ASSOCIATION.

Supreme Court of the United States. 1897.
166 U.S. 290.

[The first two sections of the Sherman Anti-Trust Act of July 2, 1890, prohibit, respectively, (1) "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations," and (2) any person from monopolizing, attempting to monopolize, or combining or conspiring to monopolize "any part of the trade or commerce among the several States, or with foreign nations." The members, railway companies, of the Trans-Missouri Freight Association, entered into a written agreement to be governed by the provisions of the articles of association which regulated rates, and laid down certain rules and regulations for all freight traffic.]

MR. JUSTICE PECKHAM delivered the opinion of the Court. . . .

Coming to the merits of the suit, there are two important questions which demand our examination. They are, first, whether the above-cited act of Congress (called herein the Trust Act) applies to and covers common carriers by railroad; and, if so, second, does the agreement set forth in the bill violate any provision of that act?

As to the first question:

The language of the act includes *every* contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States or with foreign nations. So far as the very terms of the statute go, they apply to any contract of the nature described. . . . If such an agreement restrain trade or commerce, it is prohibited by the statute, unless it can be said that an agreement, no matter what its terms, relating only to transportation cannot restrain trade or commerce. . . . It cannot be denied that those who are engaged in the transportation of persons or property from one State to another are engaged in interstate commerce, and it would seem to follow that if such persons enter into agreements between themselves in regard to the compensation to be secured from the owners of the articles transported, such agreement would at least relate to the business of commerce, and might more or less restrain it. . . .

We think, after a careful examination, that the statute covers, and was intended to cover, common carriers by railroad.

Second. The next question to be discussed is as to what is the true construction of the statute, assuming that it applies to common carriers by railroad. . . . Is it confined to a contract or combination which is only in unreasonable restraint of trade or commerce, or does it include what the language of the act plainly and in terms covers, all contracts of that nature? . . .

The term is not of such limited signification. Contracts in restraint of trade have been known and spoken of for hundreds of years both in England and in this country, and the term includes all kinds of those contracts which in fact restrain or may restrain trade. . . . A contract may be in restraint of trade and still be valid at common law. Although valid, it is nevertheless a contract in restraint of trade, and would be so described either at common law or elsewhere. . . . When, therefore, the body of an act pronounces as illegal every contract or combination in restraint of trade or commerce among the several States, etc., the plain and ordinary meaning of such language is not limited to that kind of contract alone which is in unreasonable restraint of trade, but all contracts are included in such language, and no exception or limitation can be added without placing in the act that which has been omitted by Congress.

The claim that the company has the right to charge reasonable rates, and that, therefore, it has the right to enter into a combination with competing roads to maintain such rates, cannot be admitted. The conclusion does not follow from an admission of the premise. What one company may do in the way of charging reasonable rates is radically different from entering into an agreement with other and competing roads to keep up the rates to that point. If there be any competition the extent of the charge for the service will be seriously affected by that fact. Competition will itself bring charges down to what may be reasonable, while in the case of an agreement to keep prices up, competition is allowed no play; it is shut out, and the rate is practically fixed by the companies themselves by virtue of the agreement, so long as they abide by it. . . .

. . . . In other words, we are asked to read into the act by way of judicial legislation an exception that is not placed there by the law-making branch of the Government, and this is to be done upon the theory that the impolicy of such legislation is so clear that it cannot be supposed Congress intended the natural import of the language it used. This we cannot and ought not to do. That impolicy is not so clear, nor are the reasons for the exception so potent as to permit us to interpolate an exception in the language of the act, and to thus materially alter its meaning and effect. It may be that the policy evidenced by the pas-

sage of the act itself will, if carried out, result in disaster to the roads and in a failure to secure the advantages sought from such legislation. Whether that will be the result or not we do not know and cannot predict. These considerations are not, however, for us. If the act ought to be read as contended for by defendants, Congress is the body to amend it and not this court, by a process of judicial legislation wholly unjustifiable. . . .

MR. JUSTICE WHITE, with whom concurred MR. JUSTICE FIELD, MR. JUSTICE GRAY, and MR. JUSTICE SHIRAS, dissenting.

It is unnecessary to refer to the authorities showing that although a contract may in some measure restrain trade, it is not for that reason void or even voidable unless the restraint which it produces be unreasonable. The opinion of the court concedes this to be the settled doctrine. . . .

The theory upon which the contract is held to be illegal is that even though it be reasonable, and hence valid, under the general principles of law, it is yet void, because it conflicts with the act of Congress already referred to. Now, at the outset, it is necessary to understand the full import of this conclusion. As it is conceded that the contract does not unreasonably restrain trade, and that if it does not so unreasonably restrain, it is valid under the general law, the decision, substantially, is that the act of Congress is a departure from the general principles of law, and by its terms destroys the right of individuals or corporations to enter into very many reasonable contracts. But this proposition, I submit, is tantamount to an assertion that the act of Congress is itself unreasonable. The difficulty of meeting, by reasoning, a premise of this nature is frankly conceded, for, of course, where the fundamental proposition upon which the whole contention rests is that the act of Congress is unreasonable, it would seem conducive to no useful purpose to invoke reason as applicable to and as controlling the construction of a statute which is admitted to be beyond the pale of reason. The question, then, is, is the act of Congress relied on to be so interpreted as to give it a reasonable meaning, or is it to be construed as being unreasonable and as violative of the elementary principles of justice?

The decisions of the American courts substantially conform to both the development and ultimate results of the English cases. . . . And although it is accurate to say that in the cases expressions may be found speaking of contracts as being in form, in restraint of trade and yet valid, it results from an analysis of all the American cases, as it does from the English, that these expressions in no way imply that contracts which were valid because they only partially restrained trade were yet consid-

ered as embraced within the definition of contracts in restraint of trade. On the contrary. . . .

The fact that the exclusion of reasonable contracts from the doctrine of restraint of trade was predicated on the conclusion that such contracts were no longer considered as coming within the meaning of the words "restraint of trade," is nowhere more clearly and cogently stated than in the opinion of the Court of Appeals of the State of New York, in the case of *Matthews v. Associated Press of New York*, 136 N.Y. 333.

. . . . "The courts do not go to the length of saying that contracts which they now would say are in restraint of trade are, nevertheless, valid contracts, and to be enforced; they do, however, now hold many contracts not open to the objection that they are in restraint of trade which a few years back would have been avoided on that sole ground, both here and in England. The cases in this Court which are the latest manifestations of the turn in the tide are cited in the opinion in this case at general term, and are *Diamond Match Co. v. Roeber*, 106 N.Y. 73; *Hodge v. Neill*, 107 N.Y. 244; *Leslie v. Lorillard*, 110 N.Y. 519. . . ."

This court has not only recognized and applied the distinction between partial and general restraints, but has also decided that the true test whether a contract be in restraint of trade is not whether in a measure it produces such effect, but whether under all the circumstances it is reasonable. *Oregon Steam Navigation Co. v. Winsor*, 20 Wall. 64, 68; *Gibbs v. Baltimore Gas Co.*, 130 U.S. 396, 409. . . .

It is perhaps true that the principle by which contracts in restraint of the freedom of the subject or of trade were held to be illegal was first understood to embrace all contracts which in any degree accomplished these results. But as trade developed it came to be understood that if contracts which only partially restrained the freedom of the subject or of trade were embraced in the rule forbidding contracts in restraint of trade, both the freedom of contract and trade itself would be destroyed. . . . And it was this conception also which, in its final aspect, led to the knowledge that reason was to be the criterion by which it was to be determined whether a contract which, in some measure, restrained the freedom of contract and of trade, was in reality, when considered in all its aspects, a contract of that character or one which was necessary to the freedom of contract and of trade. . . .

Indeed, it seems to me there can be no doubt that reasonable contracts cannot be embraced within the provisions of the statute if it be interpreted by the light of the supreme rule commanding that the intention of the law must be carried out, and it must be so construed as to afford the remedy and frustrate the wrong contemplated by its enactment.

The plain intention of the law was to protect the liberty of con-

tract and the freedom of trade. Will this intention not be frustrated by a construction which, if it does not destroy, at least gravely impairs, both the liberty of the individual to contract and the freedom of trade? Progress and not reaction was the purpose of the act of Congress. . . .

The remedy intended to be accomplished by the act of Congress was to shield against the danger of contract or combination by the few against the interest of the many and to the detriment of freedom. The construction now given, I think, strikes down the interest of the many to the advantage and benefit of the few. . . .

Note on *United States v. Freight Association*, and *Laissez Faire*.

Embedded in the discursive opinion of Mr. Justice Peckham is a skeleton outline of the nineteenth century American view of *laissez faire*:

It is true the results of trusts, or combinations of that nature, may be different in different kinds of corporations, and yet they all have an essential similarity, and have been induced by motives of individual or corporate aggrandizement as against the public interest. In business or trading combinations they may even temporarily, or perhaps permanently, reduce the price of the article traded in or manufactured, by reducing the expense inseparable from the running of many different companies for the same purpose. Trade or commerce under those circumstances may nevertheless be badly and unfortunately restrained by driving out of business the small dealers and worthy men whose lives have been spent therein, and who might be unable to readjust themselves to their altered surroundings. Mere reduction in the price of the commodity dealt in might be dearly paid for by the ruin of such a class, and the absorption of control over one commodity by an all-powerful combination of capital. In any great and extended change in the manner or method of doing business it seems to be an inevitable necessity that distress and, perhaps, ruin shall be its accompaniment in regard to some of those who were engaged in the old methods. . . . These are misfortunes which seem to be the necessary accompaniment of all great industrial changes. It takes time to effect a readjustment of industrial life so that those who are thrown out of their old employment, by reason of such changes as we have spoken of, may find opportunities for labor in other departments than those to which they have been accustomed. . . .

It is wholly different, however, when such changes are effected by combinations of capital, whose purpose in combining is to control the production or manufacture of any particular article in the market, and by such control dictate the price at which the article shall be sold, the effect being to drive out of business all the small dealers in the commodity and to render the public subject to the decision of the combination as to what price shall be paid for the article. In this light it is not material that the price of an article may be lowered. It is in the power of the combination to raise it, and the result in any event is unfortunate for the country by depriving it of the services of a large number of small but independent dealers who were familiar with the business and who had spent their lives in it, and who sup-

ported themselves and their families from the small profits realized therein. Whether they be able to find other avenues to earn their livelihood is not so material, because it is not for the real prosperity of any country that such changes should occur which result in transferring an independent business man, the head of his establishment, small though it might be, into a mere servant or agent of a corporation for selling the commodities which he once manufactured or dealt in, having no voice in shaping the business policy of the company and bound to obey orders issued by others. Nor is it for the substantial interests of the country that any one commodity should be within the sole power and subject to the sole will of one powerful combination of capital.

When a railroad is once built, it is said, it must be kept in operation; it must transport property, when necessary in order to keep its business, at the smallest price and for the narrowest profit, or even for no profit, providing running expenses can be paid, rather than not to do the work . . . that competition while, perhaps, right and proper in other business, simply leads in railroad business to financial ruin and insolvency, and to the operation of the road by receivers in the interest of its creditors instead of in that of its owners and the public. . . .

To the question why competition should necessarily be conducted to such an extent as to result in this relentless and continued war, to eventuate only in the financial ruin of one or all of the companies indulging in it, the answer is made that if competing railroad companies be left subject to the sway of free and unrestricted competition the results above foreshadowed necessarily happen from the nature of the case; that competition being the rule, each company will seek business to the extent of its power, and will underbid its rival in order to get the business, and such underbidding will act and react upon each company until the prices are so reduced as to make it impossible to prosper or live under them; that it is too much to ask of human nature for one company to insist upon charges sufficiently high to afford a reasonable compensation, and while doing so to see its patrons leave for rival roads who are obtaining its business by offering less rates for doing it than can be afforded and a fair profit obtained therefrom. Sooner than experience ruin from mere inanition, efforts will be made in the direction of meeting the underbidding of its rival until both shall end in ruin. The only refuge, it is said, from this wretched end lies in the power of competing roads agreeing among themselves to keep up prices for transportation to such sums as shall be reasonable in themselves, so that companies may be allowed to save themselves from themselves, and to agree not to attack each other, but to keep up reasonable and living rates for the services performed. . . . Viewed in the light of all these facts it is broadly and confidently asserted that it is impossible to believe that Congress or any other intelligent and honest legislative body could ever have intended to include all contracts or combinations in restraint of trade, and as a consequence thereof to prohibit competing railways from agreeing among themselves to keep up prices for transportation to such a rate as should be fair and reasonable. . . .

There is another side to this question, however, and it may not be amiss to refer to one or two facts which tend to somewhat modify and alter the light in which the subject should be regarded. . . . What is a proper standard by which to judge the fact of reasonable rates? Must the rate be so

high as to enable the return for the whole business done to amount to a sum sufficient to afford the shareholder a fair and reasonable profit upon his investment? If so, what is a fair and reasonable profit? That depends sometimes upon the risk incurred, and the rate itself differs in different localities: which is the one to which reference is to be made as the standard? Or is the reasonableness of the profit to be limited to a fair return upon the capital that would have been sufficient to build and equip the road, if honestly expended? Or is still another standard to be created, and the reasonableness of the charges tried by the cost of the carriage of the article and a reasonable profit allowed on that? And in such case would contribution to a sinking fund to make repairs upon the roadbed and renewal of cars, etc., be assumed as a proper item? Or is the reasonableness of the charge to be tested by reference to the charges for the transportation of the same kind of property made by other roads similarly situated?

It must also be remembered that railways are public corporations organized for public purposes. . . . The business which the railroads do is of a public nature, closely affecting almost all classes in the community—the farmer, the artisan, the manufacturer and the trader. It is of such a public nature that it may well be doubted, to say the least, whether any contract which imposes any restraint upon its business would not be prejudicial to the public interest.

"It may be entirely true that as we proceed in the development of the policy of public control over railway traffic, methods will be devised and put in operation by legislative enactment whereby railway companies and the public may be protected against the evils arising from unrestricted competition and from rate wars which unsettle the business of the community; but I fail to perceive the force of the argument that because railway companies *through their own action cause evils to themselves* and the public by sudden changes or reductions in tariff rates they must be permitted to deprive the community of the benefit of competition in securing reasonable rates for the transportation of the products of the country. Competition, free and unrestricted, is the general rule which governs all the ordinary business pursuits and transaction of life. Evils, as well as benefits, result therefrom. In the fierce heat of competition the stronger competitor may crush out the weaker; fluctuations in prices may be caused that result in wreck and disaster; yet, balancing the benefits as against the evils, the law of competition remains as a controlling element in the business world. . . . No law can be enacted nor system devised for the control of human affairs that in its enforcement does not produce some evil results, no matter how beneficial its general purpose may be. . . ." [Quoted from Judge Shiras' dissent in the Circuit Court of Appeals.] *Id.*, p. 322, ff.

While the minority does not contradict the views of the majority concerning the desirability of a free competitive capitalist system of economy, it views the entry of the Government into the rate-making field as a positive rather than as a negative force:

It cannot be questioned that the Interstate Commerce Act was intended by Congress to inaugurate a new policy for the purpose of reasonably controlling interstate commerce rates and the dealings of carriers with reference to such rates. Two systems were necessarily presented: the one a prohibition

against the exaction of all unreasonable rates and subject to this restriction, allowing the hourly and daily play of untrammelled competition, resulting in equality and discrimination; the other imposing a like duty as to reasonable rates, and whilst allowing competition subject to this limitation, preventing the injurious consequences arising from a constant and daily change between connecting or competing lines, thus avoiding discrimination and preference as to persons and places.

The second of these systems is, I submit, plainly the one embodied in the Interstate Commerce Act. At the outset reasonable rates are exacted, and the power to strike down rates which are unreasonable is provided. . . . To my mind, the judicial declaration that carriers cannot agree among themselves for the purpose of aiding in the enforcement of the provisions of the interstate commerce law, will strike a blow at the beneficial results of that act, and will have a direct tendency to produce the preferences and discriminations which it was one of the main objects of the act to frustrate. . . .

There is another contention which, I submit, is also unsound, that is the suggestion that it is impossible to say that there can be such a thing as a reasonable contract between railroads seeking to avoid sudden or secret changes in reasonable rates because the question of railroad rates is so complex and is involved in so much difficulty that to say that a rate is reasonable is equivalent to saying that it must be fixed by the railroads themselves, as no mind outside of the officials of the particular roads can determine whether a rate is reasonable or not. But this proposition absolutely conflicts with the methods of dealing with railroad rates adopted in England and expressly put in force by Congress in the Interstate Commerce Act and by many States of the Union. . . . The Interstate Commerce Act especially provides for reasonable rates, and vests primarily in the commission, and then in the courts the power to enforce the provision and like machinery is provided in many of the States. Will it be said that Congress and other legislative bodies have provided for reasonable rates and created the machinery to enforce them, when whether rates are reasonable or not is impossible of ascertainment? . . . *Id.*, p. 370.

NORTHERN SECURITIES CO. *v.* UNITED STATES.

Supreme Court of the United States. 1904.
193 U.S. 197.

MR. JUSTICE HARLAN . . . delivered the opinion of the Court. . . .

Summarizing the principal facts, it is indisputable upon this record that under the leadership of the defendants Hill and Morgan the stockholders of the Great Northern and Northern Pacific Railway corporations, having competing and substantially parallel lines from the Great Lakes and the Mississippi River to the Pacific Ocean at Puget Sound, combined and conceived the scheme of organizing a corporation under the laws of New Jersey, which should *hold* the shares of the stock of the constituent companies, such shareholders, in lieu of their shares in

those companies, to receive, upon an agreed basis of value, shares in the holding corporation; that pursuant to such combination the Northern Securities Company was organized as the holding corporation through which the scheme should be executed; and under that scheme such holding corporation has become the holder—more properly speaking, the custodian—of more than nine-tenths of the stock of the Northern Pacific, and more than three-fourths of the stock of the Great Northern. . . . The stockholders of these two competing companies disappeared, as such, for the moment, but immediately reappeared as stockholders of the holding company which was thereafter to guard the interests of both sets of stockholders as a unit, and to manage, or cause to be managed, both lines of railroad as if held *in one ownership*. . . . Those who were stockholders of the Great Northern and Northern Pacific and became stockholders in the holding company are now interested in preventing all competition between the two lines. . . . The result of the combination is that all the earnings of the constituent companies make a common fund in the hands of the Northern Securities Company to be distributed, not upon the basis of the earnings of the respective constituent companies, each acting exclusively in its own interest, but upon the basis of the certificates of stock issued by the holding company. No scheme or device could more certainly come within the words of the act—"combination in the form of trust or otherwise . . . in restraint of commerce among the several States or with foreign nations,"—or could more effectively and certainly suppress free competition between the constituent companies. . . . If such combination be not destroyed, all the advantages that would naturally come to the public under the operation of the general laws of competition, as between the Great Northern and Northern Pacific Railway companies, will be lost, and the entire commerce of the immense territory in the northern part of the United States between the Great Lakes and the Pacific Ocean at Puget Sound will be at the mercy of a single holding corporation, organized in a State distant from the people of that territory. . . .

Is the act to be construed as forbidding every combination or conspiracy in restraint of trade or commerce among the States or with foreign nations? Or, does it embrace only such restraints as are unreasonable in their nature? Is the motive with which a forbidden combination or conspiracy was formed at all material when it appears that the necessary tendency of the particular combination or conspiracy in question is to restrict or suppress free competition between competing railroads engaged in commerce among the States? . . .

The first case in this court arising under the Anti-Trust Act was *United States v. E. C. Knight Co.*, 156 U.S. 1. The next case was that of

United States v. Trans-Missouri Freight Association, 166 U.S. 290. That was followed by *United States v. Joint Traffic Association*, 171 U.S. 505, *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, and *Montague & Co. v. Lowry*, 193 U.S. 38. . . .

We will not encumber this opinion by extended extracts from the former opinions of this court. It is sufficient to say that from the decisions in the above cases certain propositions are plainly deducible and embrace the present case. These propositions are:

That although the act of Congress known as the Anti-Trust Act has no reference to the mere manufacture or production of articles or commodities within the limits of the several States, it does embrace and declare to be illegal every contract, combination or conspiracy, in whatever form, of whatever nature, and whoever may be parties to it, which directly or necessarily operates *in restraint* of trade or commerce *among the several States or with foreign nations*;

That the act is not limited to restraints of interstate and international trade or commerce that are unreasonable in their nature, but embraces *all direct restraints* imposed by any combination, conspiracy or monopoly upon such trade or commerce;

That railroad carriers engaged in interstate or international trade or commerce are embraced by the act;

That combinations even among *private* manufacturers or dealers whereby *interstate or international commerce* is restrained are equally embraced by the act;

That Congress has the power to establish *rules* by which *interstate and international* commerce shall be governed, and, by the Anti-Trust Act, has prescribed the rule of free competition among those engaged in such commerce;

That *every* combination or conspiracy which would extinguish competition between otherwise competing railroads engaged in *interstate trade or commerce*, and which would *in that way* restrain such trade or commerce, is made illegal by the act;

That the natural effect of competition is to increase commerce, and an agreement whose direct effect is to prevent this play of competition restrains instead of promotes trade and commerce. . . .

No one, we assume, will deny that these propositions were distinctly announced in the former decisions of this court. They cannot be ignored or their effect avoided by the intimation that the court indulged in *obiter dicta*. What was said in those cases was within the limits of the issues made by the parties.

Now, can this court say that such a rule is prohibited by the Constitution or is not one that Congress could appropriately prescribe when exerting its power under the commerce clause of the Constitution?

Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question which this court need not consider or determine. . . .

The rule of competition, prescribed by Congress, was not at all new in trade and commerce. . . . That such a rule was applied to interstate commerce should not have surprised anyone. . . . It may well be assumed that Congress, when enacting that statute, shared the general apprehension that a few powerful corporations or combinations sought to obtain, and, unless restrained, would obtain such absolute control of the entire trade and commerce of the country as would be detrimental to the general welfare. . . .

Now, the court is asked to adjudge that, if held to embrace the case before us, the Anti-Trust Act is repugnant to the Constitution of the United States. In this view we are unable to concur. . . .

Many suggestions were made in argument based upon the thought that the Anti-Trust Act would in the end prove to be mischievous in its consequences. Disaster to business and widespread financial ruin, it has been intimated, will follow the execution of its provisions. Such predictions were made in all the cases heretofore arising under that act. But they have not been verified. . . .

But even if the court shared the gloomy forebodings in which the defendants indulge, it could not refuse to respect the action of the legislative branch of the Government if what it has done is within the limits of its constitutional power. . . . These, plainly, are questions as to the policy of legislation which belong to another department, and this court has no function to supervise such legislation from the standpoint of wisdom or policy. . . .

MR. JUSTICE BREWER, concurring. . . .

First, let me say that while I was with the majority of the court in the decision in *United States v. Freight Association*, 166 U.S. 290, followed by the cases of *United States v. Joint Traffic Association*, 171 U.S. 505, *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, and *Montague & Co. v. Lowry*, 193 U.S. 38, . . . and while a further examination . . . has not disturbed the conviction that those cases were rightly decided, I think that in some respects the reasons given for the judgments cannot be sustained. Instead of holding that the Anti-Trust Act included all contracts, reasonable or unreasonable, in restraint of interstate trade, the ruling should have been that the contracts there presented were unreasonable restraints of interstate trade, and as such within the scope of the act. That act, as appears from its title, was leveled at only "unlawful restraints and monopolies." Congress did not

intend to reach and destroy those minor contracts in partial restraint of trade which the long course of decisions at common law had affirmed were reasonable and ought to be upheld. The purpose rather was to place a statutory prohibition with prescribed penalties and remedies upon those contracts which were in direct restraint of trade, unreasonable and against public policy. Whenever a departure from common law rules and definitions is claimed, the purpose to make the departure should be clearly shown. Such a purpose does not appear and such a departure was not intended. . . .

I have felt constrained to make these observations for fear that the broad and sweeping language of the opinion of the court might tend to unsettle legitimate business enterprises, stifle or retard wholesome business activities, encourage improper disregard of reasonable contacts and invite unnecessary litigation.

MR. JUSTICE WHITE, with whom concurred MR. CHIEF JUSTICE FULLER, MR. JUSTICE PECKHAM, and MR. JUSTICE HOLMES, dissenting. . . .

STANDARD OIL CO. v. UNITED STATES, 221 U.S. 1 (1910). MR. CHIEF JUSTICE WHITE delivered the opinion of the court. . . .

The frequent granting of monopolies and the struggle which led to a denial of the power to create them is known to all and need not be reviewed. The evils which led to the public outcry against monopolies and to the final denial of the power to make them may be thus summarily stated: (1) The power which the monopoly gave to the one who enjoyed it, to fix the price and thereby injure the public; (2) The power which it engendered by enabling a limitation on production; and (3) The danger of deterioration in quality of the monopolized article which it was deemed was the inevitable resultant of the monopolistic control over its production and sale. . . .

. . . . It is also true that while the principles concerning contracts in restraint of trade, that is, voluntary restraint put by a person on his right to pursue his calling, hence only operating subjectively, came generally to be recognized in accordance with the English rule, it came moreover to pass that contracts or acts which it was considered had a monopolistic tendency, especially those which were thought to unduly diminish competition and hence to enhance prices—in other words, to monopolize—came also in a generic sense to be spoken of and treated as they had been in England, as restricting the due course of trade, and therefore as being in restraint of trade. The dread of monopoly as an emanation of governmental power, while it passed at an early date out of mind in this country, as a result of the structure of our government, did not serve to assuage the fear as to the evil consequences which might arise from the acts of individuals producing or tending to produce the consequences of monopoly. . . .

. . . . Without going into detail, and but very briefly surveying the whole field, it may be with accuracy said that the dread of enhancement of prices

and of other wrongs which it was thought would flow from the undue limitation on competitive conditions caused by contracts or other acts of individuals or corporations led, as a matter of public policy, to the prohibition or treating as illegal all contracts or acts which were unreasonably restrictive of competitive conditions, either from the nature or character of the contract or act, or where the surrounding circumstances were such as to justify the conclusion that they had not been entered into or performed with the legitimate purpose of reasonably forwarding personal interest and developing trade, but, on the contrary, were of such a character as to give rise to the inference or presumption that they had been entered into or done with the intent to do wrong to the general public and to limit the right of individuals, thus restraining the free flow of commerce and tending to bring about the evils, such as enhancement of prices, which were considered to be against public policy. . . . In view of the common law and the law in this country as to restraint of trade, which we have reviewed, and the illuminating effect which that history must have under the rule to which we have referred, we think it results:

a. That the context manifests that the statute was drawn in the light of the existing practical conception of the law of restraint of trade. . . .

b. That in view of the many new forms of contracts and combinations which were being evolved from existing economic conditions, it was deemed essential by an all-embracing enumeration to make sure that no form of contract or combination by which an undue restraint of interstate or foreign commerce was brought about could save such restraint from condemnation. The statute under this view evidenced the intent not to restrain the right to make and enforce contracts, whether resulting from combinations or otherwise, which did not unduly restrain interstate or foreign commerce, but to protect that commerce from being restrained by methods, whether old or new, which would constitute an interference,—that is, an undue restraint.

c. And as the contracts or acts embraced in the provision were not expressly defined, since the enumeration addressed itself simply to classes of acts, those acts being broad enough to embrace every conceivable contract or combination which could be made concerning trade or commerce or the subjects of such commerce, and thus caused any act done by any of the enumerated methods anywhere in the whole field of human activity to be illegal if in restraint of trade, it inevitably follows that the provision necessarily called for the exercise of judgment which required that some standard should be resorted to for the purpose of determining whether the prohibition contained in the statute had or had not in any given case been violated. Thus not specifying, but indubitably contemplating and requiring a standard, it follows that it was intended that the standard of reason which had been applied at the common law and in this country in dealing with subjects of the character embraced by the statute was intended to be the measure used for the purpose of determining whether, in a given case, a particular act had or had not brought about the wrong against which the statute provided. . . .

Undoubtedly, the words "to monopolize" and "monopolize," as used in the section, reach every act bringing about the prohibited results. The ambiguity, if any, is involved in determining what is intended by monopolize. But this ambiguity is readily dispelled in the light of the previous history of the law of restraint of trade to which we have referred and the indication

which it gives of the practical evolution by which monopoly and the acts which produce the same result as monopoly, that is, an undue restraint of the course of trade, all came to be spoken of as, and to be indeed synonymous with, restraint of trade. . . . And, of course, . . . it becomes obvious that the criteria to be resorted to in any given case for the purpose of ascertaining whether violations of the section have been committed is the rule of reason guided by the established law and by the plain duty to enforce the prohibitions of the Act, and thus the public policy which its restrictions were obviously enacted to subserve. . . .

But, it is said, persuasive as these views may be, they may not be here applied, because the previous decisions of this court have given to the statute a meaning which expressly excludes the construction which must result from the reasoning stated. The cases are *United States v. Trans-Missouri Freight Association*, 166 U.S. 290 . . . and the *United States v. Joint Traffic Association*, 171 U.S. 505. . . .

The association or combination was assailed in each case as being in violation of the statute. It was held that they were. It is undoubted that, in the opinion in each case, general language was made use of, which, when separated from its context, would justify the conclusion that it was intended that reason could not be resorted to for the purpose of determining whether the acts complained of were within the statute. It is, however, also true that the nature and character of the contract or agreement in each case was fully referred to, and suggestions as to their unreasonableness pointed out in order to indicate that they were within the prohibition of the statute. As the cases cannot, by any possible conception, be treated as authoritative without the certitude that reason was resorted to for the purpose of deciding them, it follows as a matter of course that it must have been held by the light of reason, since the conclusion could not have been otherwise reached, that the assailed contracts or agreements were within the general enumeration of the statute, and that their operation and effect brought about the restraint of trade which the statute prohibited. . . .

MR. JUSTICE HARLAN. . . . All who recall the condition of the country in 1890 will remember that there was everywhere, among the people generally, a deep feeling of unrest. The nation had been rid of human slavery . . . but the conviction was universal that the country was in real danger from another kind of slavery sought to be fastened on the American people; namely, the slavery that would result from aggregations of capital in the hands of a few individuals and corporations controlling, for their own profit and advantage exclusively, the entire business of the country, including the production and sale of the necessities of life. Such a danger was thought to be then imminent, and all felt that it must be met firmly and by such statutory regulations as would adequately protect the people against oppression and wrong. Congress therefore took up the matter and gave the whole subject the fullest consideration. . . .

Guided by these considerations, and to the end that the people, so far as interstate commerce was concerned, might not be dominated by vast combinations and monopolies, having power to advance their own selfish ends, regardless of the general interests and welfare, Congress passed the Anti-Trust Act of 1890. . . .

It remains for me to refer, more fully than I have heretofore done, to

another, and, in my judgment, . . . the most important aspect of this case. That aspect concerns the usurpation by the judicial branch of the government of the functions of the legislative department. . . .

I said at the outset that the action of the court in this case might well alarm thoughtful men who revered the Constitution. I meant by this that many things are intimated and said in the court's opinion which will not be regarded otherwise than as sanctioning an invasion by the judiciary of the constitutional domain of Congress—an attempt by interpretation to soften or modify what some regard as a harsh public policy. This court, let me repeat, solemnly adjudged many years ago that it could not, except by “judicial legislation,” read words into the anti-trust act not put there by Congress, and which, being inserted, gives it a meaning which the words of the act, as passed, if properly interpreted, would not justify. The court has decided that it could not thus change a policy once inaugurated by legislation. The courts have nothing to do with the wisdom or policy of an act of Congress. Their duty is to ascertain the will of Congress, and if the statute embodying the expression of that will is constitutional, the courts must respect it. They have no function to declare a public policy, nor to amend legislative enactments. . . .

After many years of public service at the national capital, and after a somewhat close observation of the conduct of public affairs, I am impelled to say that there is abroad in our land a most harmful tendency to bring about the amending of constitutions and legislative enactments by means alone of judicial construction. As a public policy has been declared by the legislative department in respect of interstate commerce, over which Congress has entire control, under the Constitution, all concerned must patiently submit to what has been lawfully done, until the people of the United States . . . shall in their own time . . . require a change of that policy. . . .

UNITED STATES *v.* UNITED SHOE MACHINERY CO., 247 U.S. 32 (1918). Suit to dissolve an asserted combination and conspiracy between certain companies, makers or dealers in boot and shoe machinery, and the officers of the companies; also to have declared illegal and canceled certain leases and agreements, charged to be the means of the combination and conspiracy whereby, through control over the manufacturers of boots and shoes, competition has been prevented. . . .

The charges are met with denials, with justification that the conduct which is asserted to be illegal was in promotion of trade, in natural development of business and in strict compliance with modern trade progress; indeed, there was simply the fusion of independent and non-competing businesses . . . and the combination of various elements of machinery covered by United States patents. . . . and that the leases and agreements were but the exercise of patent rights. . . .

MR. JUSTICE MCKENNA . . . delivered the opinion of the court. . . .

The contentions could not well be more antagonistic, upon each of which there was conflicting testimony, and the important fact is to be borne in mind that it was given in open court. . . . The fact justifies deference to the findings of the trial court. . . .

The offense of combination was committed, it is contended, February 7, 1899, at which time seven shoe machinery companies were consolidated into the United Shoe Machinery Company of New Jersey, a corporation organized for that purpose. . . .

The first question is, Were the companies in competition? It confronts us at the outset; all other considerations are dependent upon it. As an element in the answer to it we must revert to the admission that the charge of combination is only as to machinery for bottoming shoes—that is, the uniting of the sole to the upper—an operation which might be called “simple” if the complexity of this record did not contradict it and if we were not told that the letters patent covering the machinery for the operation are too great in number for explanation or enumeration. . . . Indeed, the Government makes the mystery of the art and the necessity of the instrumentalities, in part, the basis of its argument.

We are therefore admonished at once of the complexity of the case and the maze of mechanical technicalities into which we should be plunged in estimating the evidence if we had not the guidance of the opinions of the judges of the trial court. The court found that the companies were not in competition at the time of their union in the United Company, and based the finding not only upon the testimony of witnesses but the uses of the machines of the respective companies and their methods of operation. The testimony was conflicting, it is true, and different judgments might be formed upon it, but from an examination of the record we cannot pronounce that of the trial court to be wrong. . . .

In considering the competition of the machines and in estimating the defendants’ acts in uniting the companies, it is to be observed that the machines were all made “under letters patent of the United States and other countries,” were owned by the companies, and covered improvements made by the companies. The patents and the businesses passed to the new company, but necessarily were the same in its hands as before. In other words, the patents did not lose their distinction, nor the machines their difference. . . .

And it was held that competition was not destroyed to the designated extent. Indeed, the court was repelled, as it might well have been, by the consequences of so holding on account of the change of conditions, the union of the companies not having been questioned by the Government for twelve years and large investments having been made not only by the company but by the public.

The lapse of time, indeed, may not condone the offense, if offense there was. It, however, may call offense in question and be an element in the refutation of accusations long deferred, or determine against particular remedies. It is to be remembered that a dissolution of the offending companies is prayed and that each of them be “separated into such parts that no one of them will constitute a monopoly of the shoe machinery business,” or that receivers be appointed to take possession of them and their assets, business and affairs and wind them up and “bring about conditions in trade and commerce among the States and with foreign nations in harmony with law.” If there be need for this the difficulties of achievement should not deter; but the difficulties may admonish against the need and demonstrate that the situation may be remediless or to be redressed at a cost too great. Therefore, considering the remedy prayed, which is extreme, even in its mildest demands, we may ask, what of the investments that have been made during these years of exten-

sion and development of the new company's business? What of the machines that have become obsolete and the new ones that have been developed? What of the patents that have expired and the new ones that have not yet run out, and how distribute them? And what of their effect when distributed? How pick out from the new conditions the conditions of 1899 and restore them and the art of that time and rehabilitate the businesses that are alleged to have ceased to exist or to have become merged in the United Company? How radical should the disintegration be? Or should there be a sale in entirety and not in parts? On the other hand, the idea is repellent that so complete an instrumentality should be dismantled and its concentration and efficiency lost. . . .

* * * * *

[The Court examines "certain instances of acquisition" by the Company of machines and patents, and notes the "complexity of rights" which "had led to and threatened litigation" and observes: "It will be seen, therefore, that there was no other way out of the deadlock, if the inventions were to be used together—that is, embodied in one machine, without infringement—than by ownership in one hand of all the patents." And: "The value of a settlement of a dispute about rights which has reached litigation or threatens it cannot be easily or accurately estimated. It depends upon too many considerations which are not reflected in the price paid. . . . We may say here of the contention of the Government as to the acquisitions—and the same comment may be made of most of its contentions—that they cast us into speculation for their estimate and urge us to decide between well-sustained conflicting opinions and adjudge the defendants guilty of a violation of law. And this, too, against the considered judgment of the trial court. . . . It is to be noted that the acquisitions in this case were not coincident in time nor parts of the same transaction. They were scattered through a period of years and varied each from the other, had no dependency, were different and unrelated steps in the development of the business of defendants. . . ." 247 U.S. 32, 47, 52, 54.]

* * * * *

We cannot go into further detail without unduly extending this opinion. . . . We sum up with a generalization that the United Company took by its organization "established businesses already of great value, possessing great possibilities of development," as said by the trial court. It was discerned that there was advantage in their concentration, and the expansion that has hence resulted has been as much in necessary evolution as by design. . . .

The company, indeed, has magnitude, but it is at once the result and the cause of efficiency, and the charge that it has been oppressively used is not sustained. . . .

Besides, it is impossible to believe . . . that the great business of the United Shoe Machinery Company has been built up by the coercion of its customers and that its machinery has been installed in most of the large factories of the country by the exercise of power, even that of patents. The installations could have had no other incentive than the excellence of the machines and the advantage of their use, the conditions imposed having adequate compensation and not being offensive to the letter or the policy of the law.

MR. JUSTICE McREYNOLDS and MR. JUSTICE BRANDEIS took no part in the consideration and decision of the case.

MR. JUSTICE DAY, dissenting. . . .

MR. JUSTICE PITNEY and MR. JUSTICE CLARKE concur in this dissent.

MR. JUSTICE CLARKE, dissenting. . . . The history of the first year of this company would not be complete without reference to the fact that the combinations and purchases made during that year resulted in collecting under one control many hundreds of patents covering every "shadow of a shade" of variation in the parts of the many machines used in the manufacture of shoes, and, it must be noticed, that in the month of December, 1900, the first of the forms of leases were developed and brought into use, which came to be known in the trade as "iron clad," and which have been discussed by Mr. Justice Day in a dissenting opinion in which I cordially concur.

The boot and shoe trade of the country was so restless under what was regarded and unhesitatingly denounced as a monopoly, strongly entrenched, that although the men engaged in that trade were now utterly dependent upon the United Company for the terms on which they might continue to do business, at least two groups of important manufacturers were formed before the commencement of this suit for the purpose of devising, if possible, some means of freeing themselves from conditions which they regarded, as the record abundantly shows, as oppressive and intolerable. . . .

. . . . This is not a case to be decided upon the detailed statements of individuals as to their intentions or upon refined distinctions as to the application of the patent law. The design was a large one, comprehensively conceived and boldly executed. The dominating spirits of the enterprise, with the advantage of knowing precisely what they wished to accomplish, rejected a "harmonious arrangement" of their interests as unlawful, but to accomplish the same end they adopted the scheme of merger, since condemned by this court as a mere "subterfuge of form."

The trade recognized the combination as a monopoly from the beginning, and for years struggled in vain to free itself by organizing competing interests; the Judiciary Committee of the House of Representatives, when the Clayton Bill was under consideration, reported as the result of its investigations that the company appeared to be "a monopoly that owns and controls the entire machinery now being used by all great manufacturing houses of the United States" and with a record before me such as in outline I have detailed, it is impossible for me to agree that this now securely entrenched monopoly is an innocent result of normal business development.

The difficulties of bringing the defendants within the restraints of the law, which are regarded by the court as all but insurmountable, seem unimpressive in the presence of the resolute manner with which this court dealt with difficulties quite as complex and interests vastly greater in the *Northern Securities*, *Standard Oil* (221 U.S. 1) and *American Tobacco Cases*, *supra* [193 U.S. 197 (1904), 221 U.S. 106]. . . .

I am authorized to say that MR. JUSTICE DAY and MR. JUSTICE PITNEY concur in this dissent.

UNITED STATES *v.* UNITED STATES STEEL CORP., 251 U.S. 417 (1920). MR. JUSTICE McKENNA delivered the opinion of the court. Suit against the Steel Corporation and certain other companies which it directs and controls by reason of the ownership of their stock. . . . The Steel Corporation is a holding company only; the other companies are the operating ones. . . .

The alternatives are perplexing—involving conflicting considerations, which, regarded in isolation, have diverse tendencies. We have seen that the judges of the District Court unanimously concurred in the view that the Corporation did not achieve monopoly, and such is our deduction, and it is against monopoly that the statute is directed, not against an expectation of it, but against its realization, and it is certain that it was not realized. The opposing conditions were underestimated. The power attained was much greater than that possessed by any one competitor—it was not greater than that possessed by all of them. Monopoly therefore, was not achieved, and competitors had to be persuaded by pools, associations, trade meetings, and through the social form of dinners, all of them, it may be, violations of the law, but transient in their purpose and effect. They were scattered through the years from 1901 . . . until 1911, but, after instances of success and failure, were abandoned nine months before this suit was brought. There is no evidence that the abandonment was in prophecy of or dread of suit; and the illegal practices have not been resumed, nor is there any evidence of an intention to resume them. . . .

What then can now be urged against the Corporation? . . .

We magnify the testimony by its consideration. Against its competitors, dealers and customers of the Corporation testify in multitude that no adventitious interference was employed to either fix or maintain prices and that they were constant or varied according to natural conditions. . . .

We have pointed out that there are several of the Government's contentions which are difficult to represent or measure, and, the one we are now considering, that is the power is "unlawful regardless of purpose," is another of them. It seems to us that it has for its ultimate principle and justification that strength in any producer or seller is a menace to the public interest and illegal because there is potency in it for mischief. . . . The fallacy it conveys is manifest. . . .

The Corporation is undoubtedly of impressive size and it takes an effort of resolution not to be affected by it or to exaggerate its influence. But we must adhere to the law and the law does not make mere size an offence or the existence of unexerted power an offence. It, we repeat, requires overt acts and trusts to its prohibition of them and its power to repress or punish them. It does not compel competition nor require all that is possible. . . .

. . . . We have seen whatever there was of wrong intent could not be executed, whatever there was of evil effect, was discontinued before this suit was brought; and this, we think, determines the decree. We say this in full realization of the requirements of the law. It is clear in its denunciation of monopolies and equally clear in its direction that the courts of the Nation shall prevent and restrain them . . . but the command is necessarily submissive to the conditions which may exist and the usual powers of a court of equity to adapt its remedies to those conditions. In other words, it is not expected to enforce abstractions and do injury thereby, it may be, to the purpose of the law. . . . We do not mean to say that the law is not its own measure and that it can be disregarded, but only that the appropriate relief in each instance is remitted to a court of equity to determine, not, and let us be explicit in this, to advance a policy contrary to that of the law, but in submission to the law and its policy, and in execution of both. And it is certainly a matter for consideration that there was no legal attack on the Corporation until 1911, ten years after its formation and the commencement

of its career. We do not, however, speak of the delay simply as to its time but on account of what was done during that time—the many millions of dollars spent, the development made, and the enterprises undertaken, the investments by the public that have been invited and are not to be ignored. And what of the foreign trade that has been developed and exists? The Government, with some inconsistency, it seems to us, would remove this from the decree of dissolution. . . .

. . . . The prayer of the Government calls for not only a disruption of present conditions but the restoration of the conditions of twenty years ago, if not literally, substantially. Is there guidance to this in the *Standard Oil Case* and the *Tobacco Case* ?

The Standard Oil Company had its origin in 1882 and through successive forms of combinations and agencies it progressed in illegal power to the day of the decree, even attempting to circumvent by one of its forms the decision of a court against it. . . . And of the practices this court said no disinterested mind could doubt that the purpose was “to drive others from the field and thus accomplish the mastery which was the end in view.”

The *Tobacco Case* has the same bad distinctions as the *Standard Oil Case*. The illegality in which it was formed continued, indeed progressed in intensity and defiance to the moment of decree. . . . In other words the purpose of the combination was signalled to competitors and the choice presented to them was submission or ruin, to become parties to the illegal enterprise or be driven “out of the business.”

. . . . We think it would be a work of sheer supererogation to point out that a decree in that case or in the *Standard Oil Case* furnishes no example for a decree in this. . . .

MR. JUSTICE McREYNOLDS and MR. JUSTICE BRANDEIS took no part in the consideration or decision of the case.

MR. JUSTICE DAY dissenting. . . .

It appears to be thoroughly established that the formation of the corporations, here under consideration, constituted combinations between competitors, in violation of law, and intended to remove competition and to directly restrain trade. . . .

The contention must be rejected that the combination was an inevitable evolution of industrial tendencies compelling union of endeavor. . . .

For many years, as the record discloses, this unlawful organization exerted its power to control and maintain prices by pools, associations, trade meetings, and as the result of discussion and agreements at the so-called “Gary Dinners,” where the assembled trade opponents secured coöperation and joint action. . . .

It inevitably follows that the corporation violated the law in its formation and by its immediate practices. . . .

I agree that the act [the Sherman Act] offers no objection to the mere size of a corporation, nor to the continued exertion of its lawful power, when that size and power have been obtained by lawful means and developed by natural growth. . . . But I understand the reiterated decisions of this court construing the Sherman Act to hold that this power may not legally be derived from conspiracies, combinations, or contracts in restraint of trade. . . .

There is no mistaking the terms of the act as they have hitherto been inter-

preted by this court. It was not intended to merely suppress unfair practices, but, as its history and terms amply show, it was intended to make it criminal to form combinations or engage in conspiracies or contracts in restraint of interstate trade. . . . I am unable to see force in the suggestion that public policy, or the assumed disastrous effect upon foreign trade of dissolving the unlawful combination, is sufficient to entitle it to immunity from the enforcement of the statute.

Nor can I yield assent to the proposition that this combination has not acquired a dominant position in the trade which enables it to control prices and production when it sees fit to exert its power. . . . That the exercise of the power may be withheld, or exerted with forbearing benevolence, does not place such combinations beyond the authority of the statute which was intended to prohibit their formation, and when formed to deprive them of the power unlawfully attained.

It is said that a complete monopolization of the steel business was never attained by the offending combinations. To insist upon such result would be beyond the requirements of the statute and in most cases practically impossible. . . .

MR. JUSTICE PITNEY and MR. JUSTICE CLARKE concur in this dissent.

SUGAR INSTITUTE, INC., *v.* UNITED STATES.

Supreme Court of the United States. 1936.

297 U.S. 553.

[Appeal from the United States District Court for the Southern District of New York, in a suit by the Government for an injunction under the Sherman Anti-Trust Act. The following statement of facts is condensed from that in the Syllabus and substituted for that in the opinion: Fifteen companies, which refined nearly all of the imported raw sugar processed in this country and supplied from 70% to 80% of the refined sugar consumed in it, formed a trade association, called The Sugar Institute, ostensibly for the purpose of doing away with unfair merchandizing practices. . . . They agreed that all discrimination between customers should be abolished and, to that end, that each company should publicly announce in advance its prices, terms and conditions of sale. . . . They also agreed upon a number of supplementary restrictions . . . , among which were (a) restrictions on the employment of brokers and warehousemen . . . ; (b) restrictions concerning transportation, absorption of freight charges, etc. . . . ; (c) limitation of the number of consignment points at which sugar was placed for distribution to surrounding areas . . . ; (d) prohibition of long-term contracts and restriction of quantity discounts on sales to customers . . . ; (e) withholding from the purchasing trade of part of the statistical information

collected by the Institute for its members and not otherwise available. . . . The Government having won a decree of injunction, defendants took an appeal directly to the Supreme Court.]

MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court. . . .

It is a fundamental and earnest contention of defendants that the occasion for the formation of the Institute was the existence of grossly unfair and uneconomical practices in the trade, and that a proper appraisal of the motives and transactions of defendants cannot be made without full appreciation of the sorry condition into which the industry had fallen. . . .

Defendants urge that the abolition of the vicious and discriminatory system of secret concessions, through the adoption of the principle of open prices publicly announced, without discrimination, was their dominant purpose in forming the Institute, and that other purposes were the supplying of accurate trade statistics, the elimination of wasteful practices, the creation of a credit bureau, and the institution of an advertising campaign. . . .

Defendants charge that the finding [in the court below] as to the illegality of their dominant purposes was "wholly without foundation." They charge that the finding was built upon an "inherent suspicion" and not upon the evidence. The Government answers by pointing to the elaborate review of the evidence in the court's opinion and findings. We think that it is manifest that the findings as to dominant purposes was not based upon any assumption *a priori*, but was an inference of fact. . . . The court found that the defendants "in most of their activities" had "gone much further than was reasonably necessary to accomplish their professed aims. . . ."

1. The "*basic agreement*."— . . . There was nothing new in the mere advance announcement of prices. . . .

The distinctive feature of the "*basic agreement*" was not the advance announcement of prices, or a concert to maintain any particular basis price for any period, but a requirement of adherence, without deviation, to the prices and terms publicly announced. . . .

It was because of the range and effect of this restriction, and the consequent deprivation of opportunity to make special arrangements, that the court found that the agreement and the course of action under it constituted an unreasonable restraint of trade. The court deemed it to be reasonably certain that "any unfair method of competition caused by the secret concession system" could have been prevented by "immediate publicity given to the prices, terms and conditions in all closed transactions."

Defendants concede the correctness of the statement. . . . But they raise the fundamental objection that the proposal is not adaptable to the sugar industry. . . .

Defendants' argument on this point is a forcible one, but we need not follow it through in detail. For the question, as we have seen, is not really with respect to the practice of making price announcements in advance of sales, but as to defendants' requirement of adherence to such announcements without the deviations which open and fair competition might require or justify. . . .

2. *Supplementary restrictions.*—The requirements and practices designed to support the basic agreement, and which the trial court condemned, relate to the employment of brokers and warehousemen, transportation, consignment points, long-term contracts, quantity discounts and other contract terms and conditions, and to the withholding of statistical information. . . .

. . . . The court deemed it reasonably certain that defendants could have secured adequate protection against illicit practices by means far less drastic, that is, through investigations, inspections, and publicity for which the Institute had unlimited resources. . . .

*** *** *** *** *** *** ***

The restrictions imposed by the Sherman Anti-Trust Act are not mechanical or artificial. We have repeatedly said that they set up the essential standard of reasonableness. *Standard Oil Co. v. United States*, 221 U.S. 1; *United States v. American Tobacco Co.*, 221 U.S. 106. They are aimed at contracts and combinations which "by reason of intent or the inherent nature of the contemplated acts, prejudice the public interests by unduly restraining competition or unduly obstructing the course of trade." *Nash v. United States*, 229 U.S. 373, 376; *United States v. Linseed Oil Co.*, 262 U.S. 371, 388, 389. Designed to frustrate unreasonable restraints, they do not prevent the adoption of reasonable means to protect interstate commerce from destructive or injurious practices and to promote competition upon a sound basis. Voluntary action to end abuses and to foster fair competitive opportunities in the public interest may be more effective than legal processes. And coöperative endeavor may appropriately have wider objectives than merely the removal of evils which are infractions of positive law. Nor does the fact that the correction of abuses may tend to stabilize a business, or to produce fairer price levels, require that abuses should go uncorrected or that an effort to correct them should for that reason alone be stamped as an unreasonable restraint of trade. . . . *Appalachian Coals v. United States*, 288 U.S. 344, 373, 374. Further, the dissemination of information is normally an aid to commerce. As free competition means a free and

open market among both buyers and sellers, competition does not become less free merely because of the distribution of knowledge of the essential factors entering into commercial transactions. The natural effect of the acquisition of the wider and more scientific knowledge of business conditions on the minds of those engaged in commerce, and the consequent stabilizing of production and price, cannot be said to be an unreasonable restraint or in any respect unlawful. *Maple Flooring Assn. v. United States*, 268 U.S. 563, 582, 583. . . .

The freedom of concerted action to improve conditions has an obvious limitation. The end does not justify illegal means. The endeavor to put a stop to illicit practices must not itself become illicit. As the statute draws the line at unreasonable restraints, a cooperative endeavor which transgresses that line cannot justify itself by pointing to evils afflicting the industry or to a laudable purpose to remove them. . . . And while the collection and dissemination of trade statistics are in themselves permissible and may be a useful adjunct of fair commerce, a combination to gather and supply information as part of a plan to impose unwarrantable restrictions, as, for example, to curtail production and raise prices, has been condemned. *American Column Co. v. United States*, 257 U.S. 377, 411, 412; *United States v. Linseed Oil Co.*, *supra*; *Maple Flooring Assn. v. United States*, *supra*, pp. 584, 585.

We have said that the Sherman Act, as a charter of freedom, has a generality and adaptability comparable to that found to be desirable in constitutional provisions. It does not go into detailed definitions. Thus in applying its broad prohibitions, each case demands a close scrutiny of its own facts. Questions of reasonableness are necessarily questions of relation and degree. In the instant case, a fact of outstanding importance is the relative position of defendants in the sugar industry. We have noted that the fifteen refiners, represented in the Institute, refine practically all the imported raw sugar processed in this country. They supply from 70 to 80 per cent. of the sugar consumed. Their refineries are in the East, South, and West, and their agreements and concerted action have a direct effect upon the entire sugar trade. While their product competes with beet sugar and "offshore"² sugar, the maintenance of fair competition between the defendants themselves in the sale of domestic refined sugar is manifestly of serious public concern. Another outstanding fact is that defendants' product is a thoroughly standardized commodity. In their competition, price, rather than brand, is generally the vital consideration. The question of unreasonable restraint of competition thus relates in the main to competition in prices, terms and conditions of sales. The fact that, because sugar is a standardized commodity, there is a strong tendency to uniformity of price, makes it the more important

² i.e., "foreign and insular refined sugar." *Id.* p. 571.—Ed.

that such opportunities as may exist for fair competition should not be impaired.

Defendants point to the abuses which existed before they formed the Institute, and to their remedial efforts. But the controversy that emerges is not as to the abuses which admittedly existed, but whether defendants' agreement and requirements went too far and imposed unreasonable restraints. After a hearing of extraordinary length,³ in which no pertinent fact was permitted to escape consideration, the trial court subjected the evidence to a thorough and acute analysis which has left but slight room for debate over matters of fact. Our examination of the record discloses no reason for overruling the court's findings in any matter essential to our decision.

In determining the relief to be afforded, appropriate regard should be had to the special and historic practice of the sugar industry. The restraints, found to be unreasonable, were the offspring of the basic agreement. The vice in that agreement was not in the mere open announcement of prices and terms in accordance with the custom of the trade. That practice which had grown out of the special character of the industry did not restrain competition. The trial court did not hold that practice to be illegal and we see no reason for condemning it. The unreasonable restraints which defendants imposed lay . . . in the steps taken to secure adherence, without deviation, to prices and terms thus announced. It was that concerted undertaking which cut off opportunities for variation in the course of competition however fair and appropriate they might be. But, in ending that restraint, the beneficial and curative agency of publicity should not be unnecessarily hampered. The trial court left defendants free to provide for immediate publicity as to prices and terms in all closed transactions. We think that a limitation to that sort of publicity fails to take proper account of the practice of the trade in selling on "moves," as already described,⁴ a practice in accordance with which the court found that "the great bulk of sugar always was and is purchased." That custom involves advance announcements, and it does not appear that arrangements merely to circulate or relay such announcements threaten competitive opportunities. On the

³"The testimony is transcribed in over 10,000 typewritten pages; more than 900 exhibits covering many thousands of pages were introduced in evidence." *Id.*, p. 571.—Ed.

⁴It was the custom of the trade to announce general price changes on the Refiners' Bulletin Boards; brokers, customers, and news agencies were notified; the Institute was so informed; competitors were often given this information also. A "move" was a price announcement, but of a special kind: "A 'move' takes place when the refiners make public announcements that at a fixed time they will advance their selling price to a named figure, either higher than the presently current selling price or higher than a reduced price which the announcements offer before the advance." *Id.*, p. 579.—Ed.

other hand, such provision for publicity may be helpful in promoting fair competition. If the requirement that there must be adherence to prices and terms openly announced in advance is abrogated and the restraints which followed that requirement are removed, the just interests of competition will be safeguarded and the trade will still be left with whatever advantage may be incidental to its established practice.

The decree.—The court below did not dissolve the Institute. The practices which had been found to constitute unreasonable restraints were comprehensively enjoined. . . .

Then follow forty-five specifications of prohibited action. As to seventeen of these paragraphs, defendants have withdrawn their assignments of error.

Paragraphs one and two of the specifications enjoin the carrying out of the open price plan so far as it seeks to compel uniform terms, regardless of circumstances, and an adherence to prices, terms, etc., announced in advance. These paragraphs cover any agreement or concerted action in

“1. Effectuating any general plan to give the same terms, conditions, or freight applications to customers, regardless of the varying circumstances of particular transactions or classes of transactions or regardless of the varying situation of particular refiners, distributors or customers or classes thereof;

“2. Selling only upon or adhering to prices, terms, conditions or freight applications announced, reported or relayed in advance of sale or refraining from deviating therefrom.”

In view of those provisions, and of the other forty specified restrictions, we think that paragraphs three, four and five should be eliminated. These paragraphs are as follows:

“3. Effectuating any system for or systematically reporting to or among one another or competitors or to a common agency, information as to current or future prices, terms, conditions, or freight applications, or lists or schedules of the same;

“4. Relaying by or through The Sugar Institute, Inc., or any other common agency, information as to current or future prices, terms, conditions, or freight applications or any list or schedule of the same;

“5. Giving any prior notice of any change or contemplated change in prices, terms, conditions, or freight applications, or relaying, reporting or announcing any such change in advance thereof.”

Such reporting or relaying, as we have said, permits voluntary price announcements by individual refiners, in accordance with trade usage, to be circulated, and subject to the restrictions imposed by the decree does not appear to involve any unreasonable restraint of competition.

Paragraph seven relates to the collection and dissemination of statistical information, as follows:

"7. Effectuating any system of gathering and/or disseminating statistical information regarding melt, sales, deliveries, stocks on hand, stocks on consignment, stocks in transit, volume of sugar moved by differential or other particular routes or types of routes, new business or any other statistical information of a similar character, wherever and to the extent that said information is not made, or is not readily, fully and fairly available to the purchasing and distributing trade."

This provision was based upon the finding that "Perfect competition and defendants' professed policy of fostering such competition require that the purchasing trade as well as the sellers have the full, detailed information which defendants withheld." That ruling has appropriate reference to the statistical data which are specified in paragraph seven and to the withholding of which we have referred. In those data the purchasing and distributing trade have a legitimate interest. But it does not follow that the purchasing and distributing trade have such an interest in every detail of information which may be received by the Institute. Information may be received in relation to the affairs of refiners which may rightly be treated as having a confidential character and in which distributors and purchasers have no proper interest. To require, under the penalties of disobedience of the injunction, the dissemination of everything that the Institute may learn might well prejudice rather than serve the interests of fair competition and obstruct the useful and entirely lawful activities of the refiners.

In this view we think that the clause in paragraph seven "or any other statistical information of a similar character" should be eliminated. The preceding specifications as to melt, sales, deliveries, stocks on hand, on consignment, or in transit, and as to transportation and new business, appear to be adequate. The words "of a similar character" have no clearly defined meaning and would place the defendants under an equivocal restriction which may do more harm than good. With the removal of that clause and the placing of the word "and" before the words "new business," paragraph seven is approved.

Following the provisions for injunction, the decree properly provides that jurisdiction is retained for the purpose of "enforcing, enlarging or modifying" its terms. . . .

MR. JUSTICE SUTHERLAND and MR. JUSTICE STONE took no part in the consideration and decision of this case.

CHAPTER X

The Regulation of Labor Unions

THE INDUSTRIAL COMBAT

Labor presents to Government an odd and unpredictable force. It is made up of a class of citizens which possesses the suffrage, but which possesses, generally, no property. It is made up of citizens who subsist on wages which are paid for jobs. Government has at all times been influenced to intervene in the concerns of private business in order to protect those who labor from harmful circumstances induced by the conditions under which work is done. Governmental interference has been necessary to prohibit or to limit the employment of child labor; to limit the hours of work for men and women; to fix minimum wages for women; to compel industry to protect its workers against occupational hazards; to compel industrial concerns to provide healthful and sanitary surroundings for their employees; to provide, or to compel industry and labor jointly to provide insurance and pension systems to support to some extent laborers who have become incapacitated by reason of health, accident, unemployment, or old age. Government has been influenced to such regulation primarily in behalf of the workingmen themselves, but also in order to protect the general welfare.

The workingman's objectives have not been, at bottom, those of government. His interests pivot on the attainment of security for himself in his job. The basic fact, for him, is that betterment as well as security depends upon the exertion of organized strength against the resistance of his employers. His purposes are, typically, the attainment of protection from competitive labor, a schedule of shorter hours, and a scale of higher pay. In the place of a possession of property rights, he has, in his thinking, a vested right to his job. An attempt to displace him by hiring another workman is an infringement of this right. Because the intervention of government is regarded as the exception and not the rule, both in theory and practice, the right to self-help, i.e., the right to strike, is held to be fundamental. He does not regard his stoppage of work as a relinquishment of his job, but, on the contrary, he expects to return to his former job when the strike is over.

The employer, for his part, hires labor and not men. He prefers non-union labor to union labor because single laborers will accept wages

lower than those which a group can obtain when opposition is dissipated. An employer's business is his property, and his right to do business is a property right. If his employees strike, he is being deprived of his property to the extent that the strike causes him to lose business or customers, and, if he can maintain his point, he is deprived lawlessly—that is, without due process. He objects to unionized labor for a further reason: when he seeks to establish a relation—a contract or a trade agreement—between himself and those he hires, he wants to negotiate with parties of his own choosing, rather than to be confronted with an authority which he must satisfy if he is to obtain employees. Governmental command to recognize such authority, he regards as an infringement of his right to pursue his calling and to use his property as to him seems fit.

The tradition of the law, while recognizing the right of laborers to strike, has been on the side of property. Where, therefore, an employer has been able to show a loss of property through the acts complained of, he has been successful in his appeal to the courts. It is of course true that the judicial power is not available to prevent, even in this tradition, natural losses incident to a strike. But where an employer has been threatened with financial ruin, or where violence growing out of a labor dispute has caused the physical destruction of the employer's property or equipment, the courts have intervened to control the tactics of labor. In order to restrict the employer's access to the courts and his opportunity to appeal for armed protection, labor has developed the boycott. The boycott is not a strike, although the two are frequently associated. The boycott is not so much a stopping of work as it is a form of isolation. Legally, the boycott is a conspiracy to injure the business of some one by abstaining or by persuading others to abstain from doing business with him. A strike, on the other hand, is a concerted stopping of work at an agreed time. The element of conspiracy is essential to the boycott, while it may be either withheld or injected into the strike as it pleases the mind of the court. A boycott is, *prima facie*, a conspiracy in restraint of trade; a strike is a preconcerted refusal to go to work. Picketing is patrolling, and may be used as an accessory either to the strike or the boycott. It serves a twofold purpose—to intimidate workers who are unwilling to coöperate with the strikers, and to attract the sympathy of the public by advertising the grievances of the striking employees. Where picketing can be represented as nothing more than a peaceful attempt to create favorable public sentiment, it is most difficult to reach by the judicial process.

The weapon most favored by the courts against labor disturbances has been the injunction. It has therefore been the defense most sought by employers and most dreaded by organized labor. Where violence is es-

sential to the success of a strike, the injunction is effective because, by prohibiting under penalty the violence, it robs the strike of much of its force. The same consideration is true in regard to certain types of picketing. It is always the present fact of conspiracy, however, which lays the boycott open to the injunctive process.

The Supreme Court held the power to issue injunctions to be inherent in the courts in *In re Debs*, 158 U.S. 564 (1848). After some experimentation, Congress has succeeded in limiting the jurisdiction of federal courts over controversies where injunctions have been customarily sought, as, for example, by the Norris-LaGuardia Act of 1932. This act was sustained by the Supreme Court in *Levering & Garrigues Co. v. Morrin*, 289 U.S. 183 (1934).

Injunction decrees have far outstripped their original purpose. The modern injunction, whether preliminary or final, permits the courts to freeze the employer-employee relationship at any desired point, and enables the courts to assume charge of the conduct of the parties to the dispute, and even to outline plans of action.

The traditional notions of commerce were, until the middle thirties, able to accommodate federal labor legislation. But the limits of the law were in sight even before the country was engulfed in economic catastrophe. The concept of commerce as movement, and the concept of commerce as a course of business, was each limited by the judicial distinction between manufacture and commerce. So long as the judicial theory of manufacture as local should control, this often intimate connection with the course of interstate business must be disregarded in applying the commerce clause. The next development of the clause was to come from the concept of commerce as enterprise.

So, in a parallel way, the thinking of the judiciary in questions arising from labor disputes was confined by the conventional concepts of property and due process. Where considerations for the public welfare did not force government to impose its own terms upon employers, the disputes arising from the employer-employee relationship were regarded as a private affair between the parties, governed only by time-honored theory. Here, as with commerce, judicial theory moved in well-worn grooves. A means of escape from these grooves had been indicated more than once by Mr. Justice Brandeis when he chose to use the phrase, "economic struggle"; but the implications obviously to be drawn from such an approach to labor problems had not, before the depression, won a majority of the Supreme Court. An alternate ideological approach had been indicated by Mr. Justice Holmes throughout his career on the Supreme Bench, and had been supported from time to time by his like-minded brethren, when they pointed out that freedom of contract between a workingman and an employer of labor is illusory. But the mem-

bers of the Supreme Court had been reluctant there, also, to plumb the meaning of the illusion.

The cases selected for reproduction in this section deal in one way or another with the fundamental legal aspects of the employer-employee relationship—aspects tied together by their common bearing on the right to withdraw from work. The right to form unions is admitted; the cases therefore are not concerned with vindicating this right. The right to organize is treated, rather, as a right which may be enforced lawfully by a strike, just as the betterment of conditions of work may be achieved by a strike. The assimilation of the two types of rights is, of course, due to the fact that the union is the chief source of the laborer's bargaining power and the guaranty of security in his employment. It is the effect of the unions on the right of the employer to hire men of his own choosing which is the subject of controversy. And so the cases open with a section on the right to organize. After this, the cases move without preliminaries to a consideration of the characteristic manifestations of the force of union labor in disputes with employers,—that is to say, the strike, the boycott, and the picket line. The closing section takes up the employers' defense, the injunction.

Most space in the opinions is given to the discussion of constitutional questions. In the American system, this, of course, is inevitable. Of these questions, the prevailing one is the effect on interstate commerce of the cessation of work and its accompanying dislocations of property. This question arises on the federal side because governmental regulation or protection of labor must be prosecuted within the framework of the commerce clause; it arises on the side of the state jurisdictions because state power is barred at the point where it directly affects interstate commerce. The principle that organized labor is protected from Congress by the First Amendment, and from the states by the First as it is conveyed through the Fourteenth Amendment, is of very recent origin, and is not noticed here. The traditional doctrine is directly and immediately traceable to the concept of commerce as the transportation of goods from one state to another, and to the proposition deduced from it, that commerce begins after manufacture ceases. Labor legislation was thus placed under severe doctrinal inhibitions—so severe, in fact, that governmental protection of labor was possible only within narrow limits, while the protection of the employer from losses incurred by the disruption of employment was amply available. Thus the decision in *Loewe v. Lawler* applied the Sherman Anti-Trust Act of 1890 to labor unions engaged in a boycott which interfered with interstate commerce; *Duplex Printing Co. v. Deering* drastically limited the Clayton Anti-Trust Act, 1914, in section 20, to disputes arising out of the relationship of an employee to his immediate employer, and *Bedford Cut Stone Co. v. Journey-*

men Stone Cutters' Ass'n follows this decision; the *Coronado Coal* decision (259 U.S. 344) recognized the suability of trades unions in general and of an unincorporated association (the United Mine Workers local) in particular. It is hardly overstatement to say that governmental regulation was restricted to two broad lines, the furtherance of the peaceful settlement of labor controversies, as instanced by the Railway Labor Act of 1926, which was sustained with the amendment of 1934 in *Virginian Ry. Co. v. System Federation No. 40*, and the restriction of the scope of the injunction, as by the Norris-LaGuardia Act of 1932. The latter act also set up a specific defense for union labor by making yellow-dog contracts unenforceable on the ground that they were against public policy. It was this type of contract which was held enforceable as a result of the decision in *Adair v. United States* in 1908.

There is throughout the cases in this chapter reference to a body of law independent of the commerce clause—law which colors the judicial thinking particularly in the cases on strikes, boycotts, and picketing. It is responsible for certain assumptions which may perhaps seem incoherent if they are not noticed here.

The starting point in the employer-employee relation is that each party to it is a free agent; *i.e.*, agent in the common meaning of the term—a free doer. This position is stated in the *Adair Case*, as follows: "The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it." The notion of an equality of bargaining power would seem to be implicit in this statement, but the validity of the proposition does not depend upon such equality. In *Coppage v. Kansas*, 236 U.S. 1, 17, the Court observed: "No doubt, wherever the right of private property exists, there must be and will be inequalities of fortune; and thus it naturally happens that parties negotiating about a contract are not equally unhampered by circumstances." But freedom of contract, the Court added, cannot be maintained unless those inequalities are recognized as legitimate.

From this general proposition, two rights flow. Again, in the words of the *Adair* opinion, "Such liberty and right [of worker and employer] embraces the right to make contracts for the purchase of the labor of others and equally the right to make contracts for the sale of one's own labor." This is one right. The other is this: The "right of the employé to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employé." The use of the word "freedom," or of the word "liberty," brings contracts for labor within the reach of the due process clause of the Fourteenth Amendment. The doctrine that busi-

ness is property brings the employer's business within range of the protection offered by the same clause. If the right to "quit" employment includes the right to withdraw temporarily, as in a strike, then a strike is outside the scope of the due process clause. But property damaged by violence arising directly from the strike is not covered by the immunity which the strike enjoys. Such destruction is illegal, and tortious, and may subject the offenders to threefold damages.

The strike is an instrument of persuasion. And so are its fellows, the boycott and picketing. They are tactics used to exert influence. The employee has a right to attempt to influence (a) his employer, (b) his fellow employees, and (c) prospective employees. But these rights may conflict with other rights. There is the right of the employer (a) to continue doing his business, and (b) to have access to his employees if they want to continue working with him. Then there is the right of those employees who want to continue to work to have access to the employer's place of business. It is this mixture of rights which dominates the mind of Chief Justice Taft in his opinion in the *Tri-City Trades Council* case. The problem is, how to reconcile these rights; and the solution is, to compel the parties concerned to refrain from intimidation of one another.

So far as the commerce clause is applicable here, two points may be noted: (1) the mere presence of violence does not bring into play that clause; and (2) nor does the mere fact that commerce is obstructed call in the clause. The obstruction must be intended, must be the objective of the strike or other tactic employed, if that clause is to cover the acts complained of. The *Adair Case* and its companion, *Coppage v. Kansas*, 236 U.S. 1 (1915), were retired, if not overruled, by *Phelps Dodge Corp. v. National Labor Relations Board*, 313 U.S. 177 (1941), where the Court held that it was an unfair labor practice within the meaning of the Wagner Act for an employer to refuse to engage workmen on the ground that they were members of a union. But this is the end of the story, and the case appears in the chapter on the New Deal. Much spadework had to be done on the commerce clause before federal regulation could penetrate so deeply into the relation of employer and employee. The foundations were laid by the Chief Justice in his opinion in *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). Discrimination by the producer against certain of his employees who were union men was the issue there. The union was a local—two of the members were motor inspectors; one, a tractor driver; three were crane operators; one was a washer in a coke plant; three others were laborers. Federal power was held to reach the discrimination by resting the decision on the proposition that "it is the effect upon commerce, not the source of the injury, which is the criterion." What remained to

be done was done by *United States v. Darby Lumber Co.*, 312 U.S. 100 (1941), which expressly overruled *Hammer v. Dagenhart*. These two are also New Deal cases.

The Right to Organize

ADAIR v. THE UNITED STATES

Supreme Court of the United States. 1908.
208 U.S. 161.

The facts are stated in the opinion.

MR. JUSTICE HARLAN delivered the opinion of the court.

This case involves the constitutionality of certain provisions of the act of Congress of June 1, 1898, 30 Stat. 424, c. 370, concerning carriers engaged in interstate commerce and their employes. . . .

The 10th section, upon which the present prosecution is based, is in these words:

"That any employer who shall require any employé as a condition of such employment, to enter into an agreement not to become or remain a member of any labor corporation or organization; or shall threaten any employé with loss of employment, or shall unjustly discriminate against any employé because of his membership in such association or who shall require any employé to enter into a contract whereby such employé shall agree to contribute to any fund for beneficial purposes; to release such employer from legal liability for any personal injury by reason of any benefit received from such fund beyond the proportion of the benefit arising from the employer's contribution ; or who shall, after having discharged an employé, attempt to prevent such employé from obtaining employment, is hereby declared to be guilty of a misdemeanor (against the United States)"

It thus appears that the criminal offense charged was, in substance and effect, that being an agent of a railroad company engaged in interstate commerce he discharged one Coppage from its service *because of his membership in a labor organization*. . . .

May Congress make it a criminal offense against the United States for an agent or officer of an interstate carrier. . . . to discharge an employé from service simply because of his membership in a labor organization?

This question is admittedly one of importance, and has been examined with care and deliberation. And the court has reached a conclusion

which, in its judgment, is consistent with both the words and spirit of the Constitution and is sustained as well by sound reason.

The first inquiry is whether the part of the tenth section of the act of 1898 upon which the first count of the indictment was based is repugnant to the Fifth Amendment of the Constitution declaring that no person shall be deprived of liberty or property without due process of law. In our opinion that section, in the particular mentioned, is an invasion of the personal liberty, as well as of the right of property, guaranteed by that Amendment. Such liberty and right embraces the right to make contracts for the purchase of the labor of others and equally the right to make contracts for the sale of one's own labor; each right, however, being subject to the fundamental conditions that no contract, whatever its subject matter, can be sustained which the law, upon reasonable grounds, forbids as inconsistent with the public interests or as hurtful to the public order or as detrimental to the common good. . . . Without stopping to consider what would have been the rights of the railroad company under the Fifth Amendment, had it been indicted under the act of Congress, it is sufficient in this case to say that as agent of the railroad company . . . it was the defendant Adair's right—and that right inhered in his personal liberty, and was also a right of property—to serve his employer as best he could. . . . It was the right of the defendant to prescribe the terms upon which the services of Coppage would be accepted, and it was the right of Coppage to become or not, as he chose, an employé of the railroad company upon the terms offered to him. . . .

While, as already suggested, the rights of liberty and property guaranteed by the Constitution against deprivation without due process of law, is subject to such reasonable restraints as the common good or the general welfare may require, it is not within the functions of government—at least in the absence of contract between the parties—to compel any person in the course of his business and against his will to accept or retain the personal services of another, or to compel any person, against his will, to perform personal services for another. The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it. So the right of the employé to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employé. . . . In all such particulars the employer and the employé have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land. . . .

The judgment must be reversed. . . .

MR. JUSTICE MOODY did not participate in the decision of this case.

MR. JUSTICE MCKENNA, dissenting.

The opinion of the court proceeds upon somewhat narrow lines. . . .

I may assume at the outset that the liberty guaranteed by the Fifth Amendment is not a liberty free from all restraints and limitations, and this must be so or government could not be beneficially exercised in many cases. Therefore in judging of any legislation which imposes restraints or limitations the inquiry must be, what is their purpose and is the purpose within one of the powers of government?

We are told that labor associations are to be commended. May not then Congress recognize their existence; yes, and recognize their power as conditions to be counted with in framing its legislation? Of what use would it be to attempt to bring bodies of men to agreement and compromise of controversies if you put out of view the influences which move them or the fellowship which binds them—maybe controls and impels them—whether rightfully or wrongfully, to make the cause of one the cause of all? And this practical wisdom Congress observed—observed, I may say, not in speculation of uncertain provision of evils, but in experience of evils—an experience which approached to the dimensions of a National calamity. The facts of history should not be overlooked, nor the course of legislation. The act involved in the present case was preceded by one enacted in 1888 of similar purport. 25 State. 501, c. 1063. That act did not recognize labor associations, or distinguish between the members of such associations and the other employes of carriers. It failed in its purpose, whether from defect in its provisions or other cause we may only conjecture. At any rate, it did not avert the strike at Chicago in 1894. Investigation followed, and, as a result of it, the act of 1898 was finally passed. Presumably its provisions and remedy were addressed to the mischief which the act of 1888 failed to reach or avert. How can it be an aid, how can controversies which may seriously interrupt or threaten to interrupt the business of carriers (I paraphrase the words of the statute), be averted or composed if the carrier can bring on the conflict or prevent its amicable settlement by the exercise of mere whim and caprice? I say mere whim or caprice, for this is the liberty which is attempted to be vindicated as the Constitutional right of the carriers. And it may be exercised in mere whim and caprice. If ability, the qualities of efficient and faithful workmanship can be found outside of labor associations, surely they may be found inside

of them. Liberty is an attractive theme, but the liberty which is exercised in sheer antipathy does not plead strongly for recognition.

But it is said it cannot be supposed that labor organizations will, "by illegal or violent measures, interrupt or impair the freedom of commerce," and to suppose so would be disrespect to a coördinate branch of the Government and to impute to it a purpose "to accord to one class of wage-earners privileges withheld from another class of wage-earners. . . ." Neither the supposition nor the disrespect is necessary, and, it may be urged, they are no more invidious than to impute to Congress a careless or deliberate or purposeless violation of the Constitutional rights of the carriers. Besides, the legislation is to be accounted for. It, by its letter, makes a difference between members of labor organizations and other employees of carriers. If it did not, it would not be here for review. What did Congress mean? Had it no purpose? Was it moved by no cause? Was its legislation mere wantonness and an aimless meddling with the commerce of the country? These questions may find their answers in *In re Debs*, 158 U.S. 564. . . .

I would not be misunderstood. I grant that there are rights which can have no material measure. There are rights which, when exercised in a private business, may not be disturbed or limited. With them we are not concerned. We are dealing with rights exercised in a *quasi*-public business and therefore subject to control in the interest of the public.

I think the judgment should be affirmed.

MR. JUSTICE HOLMES, dissenting.

I also think that the statute is constitutional, and but for the decision of my brethren I should have felt pretty clear about it.

As we all know, there are special labor unions of men engaged in the service of carriers. These unions exercise a direct influence upon the employment of labor in that business, upon the terms of such employment and upon the business itself. Their very existence is directed specifically to the business, and their connection with it is at least as intimate and important as that of safety couplers, and, I should think, as the liability of master to servant, matters which, it is admitted, Congress might regulate, so far as they concern commerce among the States. . . .

The ground on which this particular law is held bad is not so much that it deals with matters remote from commerce among the States, as that it interferes with the paramount individual rights, secured by the Fifth Amendment. The section is, in substance, a very limited interference with freedom of contract, no more. It does not require the carriers to employ any one. It does not forbid them to refuse to employ any one, for any reason they deem good, even where the notion of a choice of

persons is a fiction and wholesale employment is necessary upon general principles that it might be proper to control. The section simply prohibits the more powerful party to exact certain undertakings, or to threaten dismissal or unjustly discriminate on certain grounds against those already employed. I hardly can suppose that the grounds on which a contract lawfully may be made to end are less open to regulation than other terms. So I turn to the general question whether the employment can be regulated at all. I confess that I think that the right to make contracts at will that has been derived from the word liberty in the amendments has been stretched to its extreme by the decisions; but they agree that sometimes the right may be restrained. Where there is, or generally is believed to be, an important ground of public policy for restraint the Constitution does not forbid it, whether this court agrees or disagrees with the policy pursued. It cannot be doubted that to prevent strikes, and, so far as possible, to foster its scheme of arbitration, might be deemed by Congress an important point of policy, and I think it impossible to say that Congress might not reasonably think that the provision in question would help a good deal to carry its policy along. But suppose the only effect really were to tend to bring about the complete unionizing of such railroad laborers as Congress can deal with, I think that object alone would justify the act. I quite agree that the question what and how much good labor unions do, is one on which intelligent people may differ,—I think that laboring men sometimes attribute to them advantages, as many attribute to combinations of capital disadvantages, that really are due to economic conditions of a far wider and deeper kind—but I could not pronounce it unwarranted if Congress should decide that to foster a strong union was for the best interest, not only of the men, but of the railroads and the country at large.

NOTE TO THE ADAIR CASE

This decision was reaffirmed and applied in *Coppage v. Kansas*, 236 U.S. 1 (1915), Mr. Justice Holmes, Day, and Hughes dissenting.

Mr. Justice Pitney, speaking for the Court, said, among other things (p.17):

No doubt, whenever the right of private property exists, there must and will be inequalities of fortune; and thus it naturally happens that parties negotiating about a contract are not equally unhampered by circumstances. This applies to all contracts, and not merely to that between employer and employé. Indeed a little reflection will show that wherever the right of private property and the right of free contract co-exist, each party when contracting is inevitably more or less influenced by the question whether he has much prop-

erty, or little, or none; for the contract is made to the very end that each may gain something that he needs or desires more urgently than that which he proposes to give in exchange. And, since it is self-evident that, unless all things are held in common, some persons must have more property than others, it is from the nature of things impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights. . . .

And since a State may not strike down directly it is clear that it may not do so indirectly, as by declaring in effect that the public good requires the removal of those inequalities that are but the normal and inevitable result of their exercise, and then invoking the police power in order to remove the inequalities, without other object in view.

Mr. Justice Holmes (p. 26):

In present conditions a workman not unnaturally may believe that only by belonging to a union can he secure a contract that shall be fair to him. . . . If that belief, whether right or wrong, may be held by a reasonable man, it seems to me that it may be enforced by law in order to establish *the equality of the position between the parties in which liberty of contract begins*.¹

Mr. Justice Day, with Mr. Justice Hughes concurring, distinguished the present case from *Adair v. United States*, and emphasized the narrow scope of that decision. He quoted (p. 32):

"This decision is therefore restricted to the question of the validity of the particular provision in the act of Congress making it a crime against the United States for an agent or officer of an interstate carrier to discharge an employé from its service because of his being a member of a labor organization."

Then he proceeded:

The right to join labor unions is undisputed, and has been the subject of frequent affirmation in judicial opinions. Acting within their legal rights, such associations are as legitimate as any organization of citizens formed to promote their common interest. They are organized under the laws of many States . . . and the right to join them, as against coercive action to the contrary may be the legitimate subject of protection in the exercise of the police authority of the States. This statute . . . has for its avowed purpose the protection of the exercise of a legal right, by preventing an employer from depriving an employé of it as a condition to obtaining employment. I see no reason why a State may not, if it chooses, protect this right, as well as other legal rights. . . .

It would be impossible to maintain that because one is free to accept or refuse a given employment, or because one may at will employ or refuse to employ another, it follows that the parties have a constitutional right to insert in an agreement of employment any stipulation they choose. They

¹ Italics are mine.—Ed.

cannot put in terms that are against public policy either as it is deemed by the courts to exist at common law or as it may be declared by the legislature as the arbiter within the limits of reason of the public policy of the State. . . .

I think that the act now under consideration, and kindred ones, are intended to promote the same liberty of action for the employé as the employer confessedly enjoys. The law should be as zealous to protect the constitutional liberty of the employé as it is to guard that of the employer. . . .

Mr. Justice Day voted with the majority in the *Adair* case; Mr. Justice Holmes dissented. He apparently believed with the majority that the principle of that case controlled the present case; for he expressed the opinion that the former case should be overruled. Mr. Justice Hughes came on to the Court after the *Adair* decision. Mr. Justice McKenna, who dissented in the earlier case, voted with the majority in the present case. It would seem that he felt bound by authority.

In *Truax v. Raich*, 239 U.S. 33 (1915), the Court had under consideration an Arizona law which prohibited every employer of more than five workers from employing more aliens than twenty per cent of the total number of employees. Truax was a restaurant keeper who employed nine workers, seven of whom were aliens. Raich was an Austrian, employed as a cook in the restaurant. Mr. Justice Hughes, speaking for the Court, with Mr. Justice McReynolds dissenting, observed:

It is sought to classify this act as an exercise of the power of the State to make reasonable classifications in legislating to promote the health, safety, morals and welfare of those within its jurisdiction. But this admitted authority, with the broad range of legislative discretion that it implies, does not go so far as to make it possible for the State to deny to lawful inhabitants, because of their race or nationality, the ordinary means of earning a livelihood. . . . The discrimination against aliens in the wide range of employments to which the act relates is made an end in itself. . . . It must be also said that reasonable classification implies action consistent with the legitimate interests of the State. . . . No special public interest with respect to any particular business is shown that could possibly be deemed to support the enactment, for as we have said it relates to every sort. The discrimination is against aliens as such in competition with citizens in the described range of enterprises. . . .

VIRGINIA RAILWAY CO. v. SYSTEM FEDERATION NO. 40.

Supreme Court of the United States. 1937.
300 U.S. 515.

MR. JUSTICE STONE delivered the opinion of the Court.

This case presents questions as to the constitutional validity of certain provisions of the Railway Labor Act of May 20, 1926 . . . as amended by the Act of June 21, 1934, c. 691, 48 Stat. 1185. . . .

Respondents are System Federation No. 40, which will be referred to as the Federation, a labor organization affiliated with the American Federation of Labor and representing shop craft employees of petitioner railway. . . . They brought the present suit . . . to compel petitioner, an interstate railway carrier, to recognize and treat with respondent Federation . . . and to restrain petitioner from in any way interfering with, influencing or coercing its shop craft employees in their free choice of representatives. . . .

Petitioner here, as below, makes two main contentions: First, with respect to the relief granted, it maintains that # 2, Ninth, of the Railway Labor Act, which provides that a carrier shall treat with those certified by the Mediation Board to be the representatives of a craft or class, imposes no legally enforceable obligation upon the carrier to negotiate with the representatives so certified. . . . Second, that # 2, Ninth, in so far as it attempts to regulate labor relations between petitioner and its "back shop" employees, is not a regulation of interstate commerce authorized by the commerce clause because, as it asserts, they are engaged solely in intrastate activities; and that so far as it imposes on the carrier any obligation to negotiate with a labor union authorized to represent its employees, and restrains it from making agreements with any other labor organization, it is a denial of due process guaranteed by the Fifth Amendment. . . .

The concurrent findings of fact of the two courts below are not shown to be plainly erroneous or unsupported by evidence. We accordingly accept them as the conclusive basis for decision . . . and address ourselves to the questions of law raised by the record.

First. The obligation imposed by the statute. By Title III of the Transportation Act of February 28, 1920, . . . Congress set up the Railroad Labor Board as a means for the peaceful settlement, by agreement or by arbitration, of labor controversies between interstate carriers and their employees. . . . The decisions of the Board were supported by no legal sanctions. . . .

In 1926 Congress, aware of the impotence of the Board, and of the fact that its authority was generally not recognized or respected by the railroads or their employees, made a fresh start toward the peaceful settlement of labor disputes affecting railroads, by the repeal of the 1920 Act and the adoption of the Railway Labor Act. . . . By the new measure Congress continued its policy of encouraging the amicable adjustment of labor disputes by their voluntary submission to arbitration before an impartial board, but it supported that policy by the imposition of legal obligations. It provided means for enforcing the award obtained by arbitration between the parties to labor disputes. # 9. In certain circumstances it prohibited any change in conditions, by the parties to

an unadjusted labor dispute, for a period of thirty days, except by agreement. # 10. It recognized their right to designate representatives for the purposes of the Act "without interference, influence or coercion exercised by either party over the self-organization or designation of representatives by the other." # 2, Third. Under the last-mentioned provision this Court held, in the *Railway Clerks* case, [281 U.S. 548,] that employees were free to organize and to make choice of their representatives without the "coercive interference" and "pressure" of a company union organized and maintained by the employer; and that the statute protected the freedom of choice of representatives, which was an essential of the statutory scheme, with a legal sanction which it was the duty of courts to enforce by appropriate decree.

The prohibition against such interference was continued and made more explicit by the amendment of 1934. Petitioner does not challenge that part of the decree which enjoins any interference by it with the free choice of representatives by its employees, and the fostering, in the circumstances of this case, of the company union. . . .

But petitioner insists that the statute affords no legal sanction for so much of the decree as directs petitioner to "treat with" respondent Federation "and exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, and to settle all disputes whether arising out of the application of such agreements or otherwise."

It is, we think, not open to doubt that Congress intended that this requirement be mandatory upon the railroad employer, and that its command, in a proper case, be enforced by the courts. . . . Neither the purposes of the later Act, as amended, nor its provisions when read, as they must be, in the light of our decision in the *Railway Clerks* case, *supra*, lend support to the contention that its enactments, which are mandatory in form and capable of enforcement by judicial process, were intended to be without legal sanction.

Experience had shown, before the amendment of 1934, that when there was no dispute as to the organizations authorized to represent the employees, and when there was willingness of the employer to meet such representative for a discussion of their grievances, amicable adjustment of differences had generally followed and strikes had been avoided. On the other hand, a prolific source of dispute had been the maintenance by the railroads of company unions and the denial by railway management of the authority of representatives chosen by their employees. . . . Section 2, Ninth, of the amended Act, was specifically aimed at this practice. It provided a means for ascertaining who are the authorized representatives of the employees through intervention and certification by the Mediation Board, and commanded the carrier to treat with the repre-

sentatives so certified. That the command was limited in its application to the case of intervention and certification by the Mediation Board indicates not that its words are precatory, but only that Congress hit at the evil "where experience shows it to be most felt." *Keokee Coke Co. v. Taylor*, 234 U.S. 224, 227. . . .

Petitioner's insistence that the statute does not warrant so much of the decree as forbids it to enter into contracts of employment with its individual employees is based upon a misconstruction of the decree. Both the statute and the decree are aimed at securing settlement of labor disputes by inducing collective bargaining with the true representative of the employees and by preventing such bargaining with any who do not represent them. . . .

Propriety of Relief in Equity. Petitioner contends that if the statute is interpreted as requiring the employer to negotiate with the representative of his employees, its obligation is not the appropriate subject of a decree in equity; that negotiation depends on desires and mental attitudes which are beyond judicial control, and that since equity cannot compel the parties to agree, it will not compel them to take the preliminary steps which may result in agreement.

There is no want of capacity in the court to direct complete performance of the entire obligation: both the negative duties not to maintain a company union and not to negotiate with any representative of the employees other than respondent and the affirmative duty to treat with respondent. . . .

It is true that a court of equity may refuse to give any relief when it is apparent that that which it can give will not be effective or of benefit to the plaintiff. Equity will not decree the execution of a partnership agreement since it cannot compel the parties to remain partners . . . , or compel one to enter into performance of a contract of personal service which it cannot adequately control. . . . But the extent to which equity will go to give relief where there is no adequate remedy at law is not a matter of fixed rule. It rests rather in the sound discretion of the court. . . . Whether the decree will prove so useless as to lead a court to refuse to give it, is a matter of judgment to be exercised with reference to the special circumstances of each case rather than to general rules which at most are but guides to the exercise of discretion. . . .

In considering the propriety of the equitable relief granted here, we cannot ignore the judgment of Congress, deliberately expressed in legislation, that where the obstruction of the company union is removed, the meeting of employers and employees at the conference table is a powerful aid to industrial peace. Moreover, the resources of the Railway Labor Act are not exhausted if negotiation fails in the first instance to result in agreement. If disputes concerning changes in rates of pay, rules or

working conditions, are "not adjusted by the parties in conference," either party may invoke the mediation services of the Mediation Board, or the parties may agree to seek the benefits of the arbitration provision of # 7. With the coercive influence of the company union ended, and in view of the interest of both parties in avoiding a strike, we cannot assume that negotiation, as required by the decree, will not result in agreement, or lead to successful mediation or arbitration, or that the attempt to secure one or another through the relief which the district court gave is not worth the effort.

More is involved than the settlement of a private controversy without appreciable consequences to the public. . . . Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved. . . . It is for similar reasons that courts, which traditionally have refused to compel performance of a contract to submit to arbitration enforce statutes commanding performance of arbitration agreements. . . .

Second. Constitutionality of # 2 of the Railway Labor Act. (A) Validity Under the Commerce Clause. The power of Congress over interstate commerce extends to such regulations of the relations of rail carriers to their employees as are reasonably calculated to prevent the interruption of interstate commerce by strikes and their attendant disorders. *Wilson v. New*, 243 U.S. 332, 347-348. . . . It was for Congress to make the choice of the means by which its objective of securing the uninterrupted service of interstate railroads was to be secured, and its judgment, supported as it is by our long experience with industrial disputes, and the history of railroad labor relations, to which we have referred, is not open to review here. The means chosen are appropriate to the end sought and hence are within the congressional power. . . .

But petitioner insists that the Act as applied to its "back shop" employees is not within the commerce power since their duties have no direct relationship to interstate transportation. . . . They are engaged in making classified repairs, which consist of heavy repairs on locomotives and cars withdrawn from service for that purpose for long periods (an average of 105 days for locomotives and 109 days for cars). The repair work is upon the equipment used by petitioner in its transportation service, 97% of which is interstate. . . . When not engaged in repair work, the back shop employees perform "store order work," the manufacture of material such as rivets and repair parts. . . .

The activities in which these employees are engaged have such a relation to the other confessedly interstate activities of the petitioner that they are to be regarded as a part of them. All taken together fall within the power of Congress over interstate commerce. . . . Both courts

below have found that interruption by strikes of the back shop employees, if more than temporary, would seriously cripple petitioner's interstate transportation. . . . The cause is not remote from the effect. The relation between them is not tenuous. The effect on commerce cannot be regarded as negligible. . . .

(B) *Validity of # 2 of the Railway Labor Act Under the Fifth Amendment.* . . .

Even though Congress, in the choice of means to effect a permissible regulation of commerce, must conform to due process, . . . it is evident that where, as here, the means chosen are appropriate to the permissible end, there is little scope for the operation of the due process clause. . . .

. . . . The quality of the action compelled, is reasonableness, and therefore the lawfulness of the compulsion, must be judged in the light of the conditions which have occasioned the exercise of governmental power. If the compulsory settlement of some differences, by arbitration, may be within the limits of due process, . . . it seems plain that the command of the statute to negotiate for the settlement of labor disputes, given in the appropriate exercise of the commerce power, cannot be said to be so arbitrary or unreasonable as to infringe due process. . . .

Strikes, Boycotts, and the Picket Line

LOEWE v. LAWLOR.

Supreme Court of the United States. 1908.
208 U.S. 274.

The facts are stated in the opinion.

MR. CHIEF JUSTICE FULLER delivered the opinion of the court.

This was an action brought in the Circuit Court for the District of Connecticut under # 7 of the Anti-Trust Act of July 2, 1890, c. 647, 26 Stat. 209, claiming threefold damages for injuries inflicted on plaintiffs by a combination or conspiracy declared to be unlawful by the Act. . . .

The first, second and seventh sections of that act are as follows.

1. "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor. . . .

2. "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize

any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor. . . .

7. "Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any Circuit Court of the United States in the district in which the defendant resides or is found. . . ."

In our opinion, the combination described in the declaration is a combination "in restraint of trade or commerce among the several States," in the sense in which those words are used in the act. . . .

The combination charged falls within the class of restraints of trade aimed at compelling third parties and strangers involuntarily not to engage in the course of trade except on conditions that the combination imposes;

United States v. Trans-Missouri Freight Association, 166 U.S. 290; *United States v. Joint Traffic Association*, 171 U.S. 505; and *Northern Securities Company v. United States*, 193 U.S. 197, hold in effect that the Anti-Trust law has a broader application than the prohibition of restraints of trade unlawful at common law. . . .

We do not pause to comment on cases such as *United States v. Knight*, 156 U.S. 1; *Hopkins v. United States*, 171 U.S. 578; and *Anderson v. United States*, 171 U.S. 604; in which the undisputed facts showed that the purpose of the agreement was not to obstruct or restrain intrastate commerce. The object and intention of the combination determined its legality.

In *Swift v. United States*, 196 U.S. 375, a bill was brought against a number of corporations, firms and individuals of different States. . . .

Mr. Justice Holmes, speaking for the court, said (pp. 395, 396, 398): "Commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business. . . .

* * * * *

"The general objection is urged that the bill does not set forth sufficient, definite or specific facts. This objection is serious, but it seems to us inherent in the nature of the case. The scheme alleged is so vast that it presents a new problem in pleading. . . .

* * * * *

"The scheme as a whole seems to us to be within reach of the law. The constituent elements are enough to give to the scheme a body and, for all that we can say, to accomplish it. Moreover, whatever we may think of them separately, when we take them up as distinct charges, they are alleged sufficiently as elements of the scheme."

And the same principle was expressed in *Aikens v. Wisconsin*, 195 U.S. 194, 205 in which Mr. Justice Holmes said:

"The statute is directed against a series of acts. . . . But an act, which in itself is merely a voluntary muscular contraction, derives all its character from the consequences which will follow it under the circumstances in which it was done. When the acts consist of making a combination calculated to cause temporal damage, the power to punish such acts, when done maliciously, cannot be denied because they are to be followed and worked out by conduct which might have been lawful if not preceded by the acts. No conduct has such an absolute privilege as to justify all possible schemes of which it may be a part. The most innocent . . . acts or omissions may be made a step in a criminal plot." . . .

In *Addyston Pipe and Steel Company v. United States*, 175 U.S. 211, Mr. Justice Peckham, delivering the opinion, said (p. 242): "And when Congress has enacted a statute such as the one in question, any agreement or combination which directly operates not alone upon the manufacture but upon the sale, transportation and delivery of an article of interstate commerce, by preventing or restricting its sale, etc., thereby regulates interstate commerce."

In *Montague & Company v. Lowry*, 193 U.S. 38, which was an action brought by a private citizen under # 7 against a combination engaged in the manufacture of tiles, defendants were wholesale dealers in tiles in California and combined with manufacturers in other States to restrain the interstate traffic in tiles by refusing to sell any tiles to any wholesale dealer in California who was not a member of the association except at a prohibitive rate. The case was a commercial boycott against such dealers in California as would not or could not obtain membership in the association. . . . This court held that this obstruction to the purchase of tiles, a fact antecedent to physical transportation, was within the prohibition of the act. Mr. Justice Peckham, speaking for the court, said (p. 45), concerning the agreement, that it "restrained trade, for it narrowed the market for the sale of tiles in California from the manufacturers and dealers therein in other States, so that they could only be sold to the members of the association, and it enhanced prices to the non-member."

The averments here are that there was an existing interstate traffic between plaintiffs and citizens of other States, and that for the direct purpose of destroying such interstate traffic defendants combined not merely to prevent plaintiffs from manufacturing articles then and there intended for transportation beyond the State, but also to prevent the vendees from reselling the hats which they had imported from Connecticut, or from further negotiating with plaintiffs for the purchase and transportation of such hats from Connecticut to the various places of destination. So that, although some of the means whereby the interstate traffic was to be destroyed were acts within a State, and some of them were in themselves as a part of their obvious purpose and effect beyond

the scope of Federal authority, still, as we have seen, the acts must be considered as a whole, and the plan is open to condemnation, notwithstanding a negligible amount of intrastate business might be affected in carrying it out. If the purposes of the combination were, as alleged, to prevent any interstate transportation at all, the fact that the means operated at one end before physical transportation commenced and at the other end after the physical transportation ended was immaterial.

Nor can the act in question be held inapplicable because defendants were not themselves engaged in interstate commerce. The act made no distinction between classes. . . .

Subsequently came the litigation over the Pullman strike and the decisions, *In re Debs*, 64 Fed. Rep. 724, 745, 755; S.C., 158 U.S. 564. The bill in that case was filed by the United States against the officers of the American Railway Union, which alleged that a labor dispute existed between the Pullman Palace Car Company and its employ  s; that thereafter the four officers of the railway union combined together and with others to compel an adjustment of such dispute by creating a boycott against the cars of the company; that to make such boycott effective they had already prevented certain of the railroads running out of Chicago from operating their trains; that they asserted that they could and would tie up, paralyze and break down any and every railroad which did not accede to their demands. . . .

The Circuit Court proceeded principally upon the Sherman Anti-Trust law, and granted an injunction. In this court the case was rested upon the broader ground that the Federal Government had full power over interstate commerce and over the transmission of the mails. . . . But in reference to the Anti-Trust Act the court expressly stated (158 U.S. 600):

"We enter into no examination of the act of July 2, 1890, c. 647, 26 Stat. 209. . . . It must not be understood from this that we dissent from the conclusions of that court in reference to the scope of the act. . . ."

And in the opinion, Mr. Justice Brewer, among other things, said (p. 581):

"It is curious to note the fact that in a large proportion of the cases in respect to interstate commerce brought to this court the question presented was of the validity of state legislation in its bearing upon interstate commerce, and the uniform course of decision has been to declare that it is not within the competency of a State to legislate in such a manner as to obstruct interstate commerce. If a State, with its recognized powers of sovereignty, is impotent to obstruct interstate commerce, can it be that any mere voluntary association of individuals within the limits of that State has a power which the State itself does not possess?"

The question answers itself, and in the light of the authorities the only inquiry is as to the sufficiency of the averments of fact. . . .

At the risk of tediousness, we repeat that the complaint averred that plaintiffs were manufacturers of hats in Danbury, Connecticut, having a factory there, and were then and there engaged in an interstate trade in some twenty States other than the State of Connecticut; that they were practically dependent upon such interstate trade to consume the product of their factory. . . .

The defendants were members of a vast combination called The United Hatters of North America, comprising about 9,000 members and including a large number of subordinate unions, and that they were combined with some 1,400,000 others into another association known as The American Federation of Labor, of which they were members ; that defendants were "engaged in a combined scheme and effort to force all manufacturers of fur hats in the United States against their will and their previous policy of carrying on their business, to organize their workmen to unionize their shops and to carry out such scheme by means of intimidation of and threats made to such manufacturers and their customers in the several States, of boycotting them, their product and their customers, using therefor all the powerful means at their command. . . ."

That the conspiracy or combination was so far progressed that out of eighty-two manufacturers seventy had accepted the terms that the shop should be conducted in accordance with the will of the American Federation of Labor; that the local union demanded of plaintiffs that they should unionize their shop under peril of being boycotted which demand defendants declined to comply with. . . .

And then followed the averments that the defendants proceeded to carry out their combination to restrain and destroy interstate trade and commerce between plaintiffs and their customers in other States by employing the identical means contrived for that purpose. . . .

We think a case within the statute was set up. . . .

Judgment reversed. . . .

TRUAX *v.* CORRIGAN.

Supreme Court of the United States. 1921.
257 U.S. 312.

MR. CHIEF JUSTICE TAFT delivered the opinion of the court.

The plaintiffs in error, who were plaintiffs below, and will be so called, own, maintain and operate, on Main Street, in the City of Bisbee,

Arizona, a restaurant, known as the "English Kitchen." The defendants are cooks and waiters formerly in the employ of the plaintiffs, together with the labor union and the trades assembly of which they were members. All parties are residents of the State of Arizona.

The complaint set out the following case:

In April, 1916, a dispute arose between the plaintiffs and the defendants' union concerning the terms and conditions of employment of the members of the union. The plaintiffs refused to yield to the terms of the union, which thereupon ordered a strike of those of its members who were in the plaintiffs' employ. To win the strike the defendants entered into a boycott to injure plaintiffs by inducing plaintiffs' customers to cease to patronize the plaintiffs. The method included picketing, displaying banners, advertising the strike, denouncing the plaintiffs as "unfair" to the union and the circulation of handbills containing abusive and libelous charges against the plaintiffs, their employees and their patrons, and intimations of injury to future patrons. . . .

In consequence of defendants' acts, many customers were induced to cease from patronizing plaintiffs. . . . The complaint averred that if the acts were continued, the business would be entirely destroyed. . . .

The complaint further averred that the defendants were relying for immunity on Paragraph 1464 of the Revised Statutes of Arizona, 1913, which is in part as follows:

[The first paragraph quoted, shortly stated, forbade the issuance of an injunction in labor disputes "unless necessary to prevent irreparable injury to property for which injury there is no adequate remedy at law." The second and last paragraph quoted provided that no injunction should prohibit any person from going on strike or from using the customary tactics of the boycott.]

The plaintiffs allege that this paragraph if it made lawful defendants' acts contravened the Fourteenth Amendment to the Constitution of the United States by depriving plaintiffs of their property without due process of law. . . .

The facts alleged are admitted by the demurrer, and in determining their legal effect as a deprivation of plaintiffs' legal rights under the Fourteenth Amendment, we are at as full liberty to consider them as was the State Supreme Court. . . . Nor does the court's declaration that the statute is a rule of evidence bind us in such an investigation. . . . In cases brought to this court from state courts for review, on the ground that a federal right set up in the state court has been wrongly denied this court as an incident of its power may go behind the finding to see whether it is without substantial support. If the rule were otherwise, it almost always would be within the power of a state court

practically to prevent a review here. . . . The only respect in such a case in which this court is bound by the judgment of the State Supreme Court is in the construction which that court puts upon the statute. . . .

A law which operates to make lawful such a wrong as is described in plaintiffs' complaint deprives the owner of the business and the premises of his property without due process, and can not be held valid under the Fourteenth Amendment.

The opinion of the State Supreme Court in this case if taken alone seems to show that the statute grants complete immunity from any civil or criminal action to the defendants, for it pronounces their acts lawful. If, however, we are to assume that the criminal laws of Arizona do provide prosecution for such libels against the plaintiffs though committed by this particular class of tort feors . . . still the tort here committed was not a mere libel of plaintiffs. That would not have had any such serious consequences. The libel of the plaintiffs here was not the cause of the injury; it was only one step in a conspiracy, unlawfully to influence customers.

It is argued that, while the right to conduct a lawful business is property, the conditions surrounding that business, such as regulations of the State for maintaining peace, good order, and protection against disorder, are matters in which no person has a vested right. The conclusion to which this inevitably leads in this case is that the State may withdraw all protection to a property right by civil or criminal action for its wrongful injury if the injury is not caused by violence. . . . It is true that no one has a vested right in any particular rule of the common law, but it is also true that the legislative power of a State can only be exerted in subordination to the fundamental principles of right and justice which the guaranty of due process in the Fourteenth Amendment is intended to preserve, and that a purely arbitrary or capricious exercise of that power whereby a wrongful and highly injurious invasion of property rights, as here, is practically sanctioned and the owner stripped of all real remedy, is wholly at variance with those principles.

It is to be observed that this is not the mere case of a peaceful secondary boycott as to the illegality of which courts have differed and States have adopted different statutory provisions. A secondary boycott of this kind is where many combine to injure one in his business by coercing third persons against their will to cease patronizing him by threats of similar injury. In such a case the many have a legal right to withdraw their trade from third persons, and they have the right to advise third persons of their intention to do so when each act is considered singly. The question in such cases is whether the moral coercion exercised over a stranger to the original controversy by steps in themselves legal becomes a legal wrong. But here the illegality of the means used is without

doubt and fundamental. The means used are the libelous and abusive attacks on the plaintiffs' reputation, like attacks on their employees and customers, threats of attacks on would-be customers, picketing and patrolling of the entrance to their place of business, and the consequent obstruction of free access thereto—all with the purpose of depriving the plaintiffs of their business. . . .

This brings us to consider the effect in this case of that provision of the Fourteenth Amendment which forbids any State to deny to any person the equal protection of the laws. . . .

The guaranty was aimed at undue favor and individual or class privilege, on the one hand, and at hostile discrimination or the oppression of inequality, on the other. It sought an equality of treatment of all persons, even though all enjoyed the protection of due process. . . .

With these views of the meaning of the equality clause, it does not seem possible to escape the conclusion that by the clauses of Paragraph 1464 of the Revised Statutes of Arizona . . . the plaintiffs have been deprived of the equal protection of the law.

It is beside the point to say that plaintiffs had no vested right in equity relief and that taking it away does not deprive them of due process of law. If, as is asserted, the granting of equitable remedies falls within the police power and is a matter which the legislature may vary as its judgment and discretion shall dictate, this does not meet the objection under the equality clause which forbids the granting of equitable relief to one man and the denying of it to another under like circumstances and in the same territorial jurisdiction. . . .

To sustain the distinction here between the ex-employees and other tort feors in the matter of remedies against them, it is contended that the legislature may establish a class of such ex-employees for special legislative treatment. . . . But we venture to think that not in any of the cases in this court has classification of persons of sound mind and full responsibility, having no special relation to each other, in respect of remedial procedure for an admitted tort been sustained. Classification must be reasonable. . . . Classification is the most inveterate of our reasoning processes. . . . It must therefore obtain in and determine legislation; but it must regard real resemblances and real differences between things, and persons, and class them in accordance with their pertinence to the purpose in hand. Classification like the one with which we are dealing here is said to be the development of the philosophic thought of the world and is opening the door to legalized experiment. When fundamental rights are thus attempted to be taken away, however, we may well subject such experiment to attentive judgment. The Constitution was intended, its very purpose was, to prevent experimentation with the fundamental rights of the individual. . . .

It is urged that this court has frequently recognized the special classification of the relations of employees and employers as proper and necessary for the welfare of the community and requiring special treatment. This is undoubtedly true, but those cases . . . as we have already pointed out in discussing the due process clause, were cases of the responsibility of the employer for injuries sustained by employees in the course of their employment. . . . It seems a far cry from classification on the basis of the relation of employer and employee in respect of injuries received in course of employment to classification based on the relation of an employer, not to an employee, but to one who has ceased to be so, in respect to torts thereafter committed by such ex-employee on the business and property right of the employer. It is said that the State may deal separately with such disputes because such controversies are a frequent and characteristic outgrowth of disputes over terms and conditions of employment. Violence of ex-employees toward present employees is also a characteristic of such disputes. Would this justify a legislature in excepting ex-employees from criminal prosecution for such assaults and leaving the assaulted persons to suits for damages at common law?

* * * * *

MR. JUSTICE HOLMES, dissenting.

The dangers of a delusive exactness in the application of the Fourteenth Amendment have been adverted to before now. . . . Delusive exactness is a source of fallacy throughout the law. By calling a business "property" you make it seem like land, and lead up to the conclusion that a statute cannot substantially cut down the advantages of ownership existing before the statute was passed. An established business no doubt may have pecuniary value and commonly is protected by law against various unjustified injuries. But you cannot give it definiteness of contour by calling it a thing. It is a course of conduct and like other conduct is subject to substantial modification according to time and circumstances both in itself and in regard to what shall justify doing it a harm. I cannot understand the notion that it would be unconstitutional to authorize boycotts and the like in aid of the employees' or the employers' interest by statute when the same result has been reached constitutionally without statutes by Courts with whom I agree. See *The Hamilton*, 207 U.S. 398, 404. . . .

I think further that the selection of the class of employers and employees for special treatment, dealing with both sides alike, is beyond criticism on principles often asserted by the Court. And especially I think that without legalizing the conduct complained of the extraordinary relief by injunction may be denied to the class. Legislation may begin

where an evil begins. If, as many intelligent people believe, there is more danger that the injunction will be abused in labor cases than elsewhere I can feel no doubt of the power of the legislature to deny it in such cases. . . .

In a matter like this I dislike to turn attention to anything but the fundamental question of the merits, but *Connolly v. Union Sewer Pipe Co.*, 184 U.S. 540, raises at least a doubt in my mind of another sort. The exception and the rule as to granting injunctions are both part of the same code, enacted at the same time. If the exception fails, according to the *Connolly Case* the statute is bad as a whole. . . . I need not press further the difficulty of requiring a State Court to issue an injunction that it never has been empowered to issue by the quasi-sovereign that created the Court.

I must add one general consideration. There is nothing that I more deprecate than the use of the Fourteenth Amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires, in the insulated chambers afforded by the several States, even though the experiments may seem futile or even noxious to me and to those whose judgment I most respect. I agree with the more elaborate expositions of my brothers Pitney and Brandeis. . . .

MR. JUSTICE PITNEY, with whom concurred MR. JUSTICE CLARKE, dissenting. . . .

It is beside the question to discuss whether, under the rules of the common law or the general principles of justice, picketing or boycotting, or the conduct of defendants however described, is lawful. . . . The question is whether in this respect the law might be altered by act of legislation, to the extent of depriving a party aggrieved, and threatened with irreparable injury, of relief by injunction.

That the right to conduct a lawful business, and thereby acquire pecuniary profits, is property, is indisputable. That the state of society, and the existing condition of good order, or the opposite, surrounding the business affect its profitability, likewise is plain. But it seems to me clear that, so far as these result from the general operation of the laws and regulations established by authority of the State for maintaining the peace, good order, and tranquility of its people those laws and regulations are subject to be changed in the normal exercise of the legislative power of the State. . . .

The use of the process of injunction to prevent disturbance of a going business by such a campaign as defendants here have conducted, is in the essential sense a measure of police regulation. . . .

Hence, I have no doubt that, without infringing the "due process" clause, a State might by statute establish protection against picketing or boycotting however conducted. . . .

But I submit with deference that this is not a matter of which plaintiffs are entitled to complain under the "equal protection" clause. There is no discrimination *as against them*; others situated like them are accorded no greater right to an injunction than is accorded to them. . . .

The guaranty of "equal protection" entitles plaintiffs to treatment not less favorable than that given to others similar circumstanced. This the present statute gives them. . . .

But were there actual discrimination, I cannot agree that this demonstrates the classification to be so arbitrary and unreasonable as to render the act a denial of the equal protection of the laws. Doubtless the legislature concluded that in labor controversies there were reasons affecting the public interest for preventing resort to the process of injunction and leaving the parties to the ordinary legal remedies, which reasons did not apply generally. . . .

MR. JUSTICE BRANDEIS, dissenting. . . .

Whether a law enacted in the exercise of the police power is justly subject to the charge of being unreasonable or arbitrary, can ordinarily be determined only by a consideration of the contemporary conditions, social, industrial and political, of the community to be affected thereby. . . . Nearly all legislation involves a weighing of public needs as against private desires; and likewise a weighing of relative social values. Since government is not an exact science, prevailing public opinion concerning the evils and the remedy is among the important facts deserving consideration. . . .

A State is free since the adoption of the Fourteenth Amendment, as it was before, not only to determine what system of law shall prevail in it, but, also, by what processes legal rights may be asserted, and in what courts they may be enforced. . . .

Nor is a State obliged to protect all property rights by injunction merely because it protects some, even if the attending circumstances are in some respects similar. . . . On grounds of expediency its application is commonly denied in cases where there is a remedy at law which is deemed legally adequate. But an injunction has been denied in many cases where the remedy at law is confessedly not adequate. This occurs whenever a dominant public interest is deemed to require that the preventive remedy, otherwise available for the protection of private rights, be refused and the injured party left to such remedy as courts of law may afford. . . . Such, for example, was the case where a

neighboring land owner sought to restrain a smelter from polluting the air, but that relief, if granted, would have necessitated shutting down the plant and this would have destroyed the business and impaired the means of livelihood of a large community. . . .

For these reasons, as well as for others stated by Mr. Justice Holmes and Mr. Justice Pitney, . . . in which I concur, the judgment of the Supreme Court of Arizona should, in my opinion, be affirmed. . . .

UNITED MINE WORKERS OF AMERICA ET AL. *v.* CORONADO COAL COMPANY
ET AL.

Supreme Court of the United States. 1922.
259 U.S. 344.

The plaintiffs in the District Court were the receivers of the Bache-Denman Coal Company, and eight other corporations in each of which the first-named company owned a controlling amount of stock. . . . These had been operated for some years as a unit under one set of officers in the Prairie Creek Valley in Sebastian County, Arkansas. . . . The defendants in the Court below were the United Mine Workers of America, and its officers, District 21 of the United Mine Workers of America, and its officers, 27 local unions in District No. 21, and their officers, and 65 individuals, mostly members of one union or another, but including some persons not members, all of whom were charged in the complaint with having entered into a conspiracy to restrain and monopolize interstate commerce, in violation of the first and second sections of the Anti-Trust Act, and with having, in the course of that conspiracy, and for the purpose of consummating it, destroyed the plaintiff's properties. . . .

The complaint avers that the United Mine Workers divide all coal mines into two classes, union or organized mines operating under a contract with the union to employ only union miners, and open shop or non-union mines, which refuse to make such a contract. . . .

The complaint further avers that, early in 1914, the plaintiff companies decided that the operating companies should go on a non-union or open shop basis. . . . The fifth, the Coronado Coal Company, continued operating with the union until April 18, 1914, when its employees struck because of its unity of interest with the other mines of the plaintiffs. The plaintiffs say that . . . the defendants . . . drove and frightened away the plaintiffs' employees . . . , prevented the plaintiffs from employing other men, destroyed the structures and facilities for mining, loading and shipping coal, and the cars of interstate carriers waiting to be loaded, as well as those already loaded with coal in and for inter-

state shipment, and prevented plaintiffs from engaging in interstate commerce. . . .

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.

There are five principal questions. . . .

First. It does not seem to us that there was a misjoinder of parties under the procedure as authorized in Arkansas. . . .

Second. Were the unincorporated associations, the International Union, District No. 21, and the local unions suable in their names?

Undoubtedly at common law, an unincorporated association of persons was not recognized as having any other character than a partnership in whatever was done, and it could only sue or be sued in the names of its members, and their liability had to be enforced against each member. . . . But the growth and necessities of these great labor organizations have brought affirmative legal recognition of their existence and usefulness and provisions for their protection, which their members have found necessary. Their right to maintain strikes, when they do not violate law or the rights of others, has been declared. The embezzlement of funds by their officers has been especially denounced as a crime. The so-called union label, which is a quasi trademark to indicate the origin of manufactured product in union labor, has been protected against pirating and deceptive use by the statutes of most of the States, and in many States authority to sue to enjoin its use has been conferred on unions. They have been given distinct and separate representation and the right to appear to represent union interests in statutory arbitrations, and before official labor boards. . . . More than this, equitable procedure adapting itself to modern needs has grown to recognize the need of representation by one person of many, too numerous to sue or to be sued ; and this has had its influence upon the law side of litigation, so that, out of the very necessities of the existing conditions and the utter impossibility of doing justice otherwise, the suable character of such an organization as this has come to be recognized in some jurisdictions. . . . It would be unfortunate if an organization with as great power as this International Union has in the raising of large funds and in directing the conduct of four hundred thousand members in carrying on, in a wide territory, industrial controversies and strikes, out of which so much unlawful injury to private rights is possible, could assemble its assets to be used therein free from liability for injuries by torts committed in course of such strikes. . . .

Though such a conclusion as to the suability of trades unions is of primary importance in the working out of justice and in protecting individuals and society from possibility of oppression and injury in their

lawful rights from the existence of such powerful entities as trade unions, it is after all in essence and principle merely a procedural matter. . . . Trade unions have been recognized as lawful [by Congress]

For these reasons, we conclude that the International Union, the District No. 21 and the twenty-seven Local Unions were properly made parties defendant here and properly served by process on their principal officers.

Third. The next question is whether the International Union was shown by any substantial evidence to have initiated, participated in or ratified the interference with plaintiffs' business which began April 6, 1914, and continued at intervals until July 17, when the matter culminated in a battle and the destruction of the Bache-Denman properties. . . . The strike was a local strike declared by the president and officers of the District Organization No. 21, embracing Arkansas, Oklahoma and Texas. . . . There is nothing to show that the International Board ever authorized it, took any part in preparation for it or in its maintenance. Nor did they or their organization ratify it by paying any of the expenses. . . . The District made the preparations and paid the bills. . . .

We conclude that the motions of the International Union, the United Mine Workers of America, and of its president and its other officers, that the jury be directed to return a verdict for them, should have been granted.

Fourth. The next question is twofold: (a) Whether the District No. 21 and the individual defendants participated in a plot unlawfully to deprive the plaintiffs of their employees by intimidation and violence and in the course of it destroyed their properties, and, (b) whether they did these things in pursuance of a conspiracy to restrain and monopolize interstate commerce. . . .

The evidence leaves no doubt that during the month of June there was a plan and movement among the union miners to make an attack upon Prairie Creek Mine No. 4. By this time the number of men secured by Bache had increased to seventy or eighty, and preparations were rapidly going on for a resumption of mining. The tense feeling in respect to the coming attack increased. . . .

The first movement toward destruction of property was at Mine No. 3, a short distance from No. 4, where the coal washhouse was set on fire. . . . The forces surrounding the mine were so numerous that by one o'clock they had driven out practically all of the defendants and set fire to the coal tippie of Mine No. 4, and destroyed all the plant by the use of dynamite and the match.

The assailants took some of Bache's employees prisoners as they were escaping. . . . The four or five prisoners were taken out of the cabin

where they had been for a short time confined, and two of them, one a former union man, were deliberately murdered. . . .

It is contended on behalf of District No. 21 and the local unions that only those members of those bodies whom the evidence shows to have participated in the torts can be held civilly liable for the damages. There was evidence to connect all these individual defendants with the acts which were done, and in view of our finding that District No. 21 and the unions are suable, we can not yield to the argument. . . .

(b) It was necessary, however, in order to hold District No. 21 liable in this suit under the Anti-Trust Act, to establish that this conspiracy to attack the Bache-Denman mines and stop the non-union employment there, was with intent to restrain interstate commerce and to monopolize the same, and to subject it to the control of the union. The evidence consisted of a history of the relations between the International Union and the union coal operators. . . .

What really is shown by the evidence in the case at bar is the stimulation of union leaders to press their unionization of non-union mines not only as a direct means of bettering the conditions and wages of their workers, but also as a means of lessening interstate competition for union operators which in turn would lessen the pressure of those operators for reduction of the union scale or their resistance to an increase. The latter is a secondary or ancillary motive whose actuating force in a given case necessarily is dependent on the particular circumstances to which it is sought to make it applicable. . . .

In the case at bar, there is nothing in the circumstances to indicate that Stewart, the president of District No. 21, or Hull, its secretary-treasurer, or any of their accomplices had in mind interference with interstate commerce or competition when they entered upon their unlawful combination to break up Bache's plan to carry on his mines with non-union men. . . .

NOTE ON UNITED MINE WORKERS *v.* CORONADO COAL CO.

This case appeared on error a second time three years after the decision. The owners of the coal mines had discovered new evidence to show that it was the intention of the striking unions directly to limit the production and consequent sale of coal in the mines affected by the strike, and to prevent its shipment to other states, where it would tend to reduce the price of the commodity and so affect injuriously wages paid for union labor in competing mines. The Court, speaking through Mr. Chief Justice Taft, found this time against the unions:

"The mere reduction in the supply of an article to be shipped in interstate commerce by the illegal or tortious prevention of its manufac-

ture or production is ordinarily an indirect and remote obstruction to that commerce. But when the intent of those unlawfully preventing the manufacture or production is shown to be to restrain or control the supply entering and moving in interstate commerce, or the price of it in interstate markets, their action is a direct violation of the Anti-Trust Act." *Coronado Coal Co. v. United Mine Workers*, 268 U.S. 295, 310 (1925).

AMERICAN STEEL FOUNDRIES *v.* TRI-CITY CENTRAL TRADES COUNCIL.

Supreme Court of the United States. 1921.
257 U.S. 184.

MR. CHIEF JUSTICE TAFT delivered the opinion of the court.

The American Steel Foundries is a New Jersey corporation operating a large plant for the manufacture of steel products in Granite City, Illinois. . . .

The Tri-City Central Trades Council is a labor organization composed of representatives of thirty-seven trade unions of Granite City, Madison and Venice, adjoining towns in Illinois, including among them electricians, cranemen, mill hands, machinists, and stationary engineers. In April, 1914, the complainant, which ordinarily in full operation employed 1600 men, and whose plant had been shut down since November of the previous year, resumed operations with about 350 of its regular men, 150 of whom belonged to the skilled trades, electricians, cranemen, mill hands, machinists and blacksmiths. . . .

Complainant's plant was in an enclosure of twenty-five acres and fronted on Niedringhaus Avenue. The Wabash and other railroads crossed this street and ran along the side of the plant. There were four tracks. The time-keeper's gate of the plant opened on to the tracks. Directly opposite on the other side of the tracks was the Wabash depot, from three to four hundred feet from the plant. It was on Niedringhaus Avenue, and this street was the one used by many of the plant's employees in going to their homes in Granite City and in reaching the terminal of the street car line which many used. . . .

It is clear from the evidence that from the outset, violent methods were pursued from time to time in such a way as to characterize the attitude of the picketers as continuously threatening. A number of employees, sometimes fifteen or more, slept in the plant for a week during the trouble, because they could not safely go to their homes. The result of the campaign was to put employees and would-be employees in such fear that many abandoned work and this seriously interfered

with the complainant in operating the plant until the issue of the restraining order (by the lower court).

The first question in the case is whether # 20 of the Clayton Act, October 15, 1914, c. 323, is to be applied in this case. The act was passed while this case was pending in the Circuit Court of Appeals. . . .

The prohibitions of # 20, material here, are those which forbid an injunction against, first, recommending, advising or persuading others by peaceful means to cease employment and labor; second, attending at any place where such person or persons may lawfully be for the purpose of peacefully obtaining or communicating information, or peacefully persuading any person to work or to abstain from working; third, peaceably assembling in a lawful manner and for lawful purposes. This court has already called attention in the *Duplex Case* to the emphasis upon the words "peaceful" and "lawful" in this section. 254 U.S. 443, 473. It is clear that Congress wished to forbid the use by the federal courts of their equity arm to prevent peaceable persuasion by employees, discharged or expectant, in promotion of their side of the dispute, and to secure them against judicial restraint in obtaining or communicating information in any place where they might lawfully be. This introduces no new principle into the equity jurisprudence of those courts. It is merely declaratory of what was the best practice always. Congress thought it wise to stabilize this rule of action and render it uniform.

The object and problem of Congress in # 20, and indeed of courts of equity before its enactment, was to reconcile the rights of the employer in his business and in the access of his employees to his place of business and egress therefrom without intimidation or obstruction, on the one hand, and the right of the employees, recent or expectant, to use peaceable and lawful means to induce present employees and would-be employees to join their ranks, on the other. . . .

How far may men go in persuasion and communication and still not violate the right of those whom they would influence? In going to and from work, men have a right to as free a passage without obstruction as the streets afford, consistent with the right of others to enjoy the same privilege. We are a social people and the accosting of one by another in an inoffensive way and an offer by one to communicate and discuss information with a view to influencing the other's action are not regarded as aggression or a violation of that other's rights. If, however, the offer is declined, as it may rightfully be, then persistence, importunity, following and dogging become unjustifiable annoyance and obstruction which is likely soon to savor of intimidation. From all this the person sought to be influenced has a right to be free and his employer has a right to have him free.

The nearer this importunate intercepting of employees or would-be

employees is to the place of business, the greater the obstruction and interference with the business and especially with the property right of access of the employer. Attempted discussion and argument of this kind in such proximity is certain to attract attention and congregation of the curious, or, it may be, interested bystanders, and thus to increase the obstruction as well as the aspect of intimidation which the situation quickly assumes. In the present case the three or four groups of picketers, were made up of from four to twelve in a group. They constituted the picket lines. Each union interested, electricians, cranemen, machinists and blacksmiths, had several representatives on the picket line, and assaults and violence ensued. They began early and continued from time to time during the three weeks of the strike after the picketing began. All information tendered, all arguments advanced and all persuasion used under such circumstances were intimidation. They could not be otherwise. It is idle to talk of peaceful communication in such a place and under such conditions. The numbers of the pickets in the groups constituted intimidation. The name "picket" indicated a militant purpose, inconsistent with peaceable persuasion. The crowds they drew made the passage of the employees to and from the place of work, one of running the gauntlet. . . . When one or more assaults or disturbances ensued, they characterized the whole campaign, which became effective because of its intimidating character, in spite of the admonitions given by the leaders to their followers as to lawful methods to be pursued, however sincere. Our conclusion is that picketing thus instituted is unlawful and can not be peaceable and may be properly enjoined by the specific term because its meaning is clearly understood in the sphere of the controversy by those who are parties to it. . . .

A restraining order against picketing will advise earnest advocates of labor's cause that the law does not look with favor on an enforced discussion of the merits of the issue between individuals who wish to work, and groups of those who do not, under conditions which subject the individuals who wish to work to a severe test of their nerve and physical strength and courage. But while this is so, we must have every regard to the Congressional intention manifested in the act and to the principle of existing law which it declared, that ex-employees and others properly acting with them shall have an opportunity, so far as is consistent with peace and law, to observe who are still working for the employer, to communicate with them and to persuade them to join the ranks of his opponents in a lawful economic struggle. Regarding as primary the rights of the employees to work for whom they will, and, undisturbed by annoying importunity or intimidation of numbers, to go freely to and from their place of labor, and keeping in mind the right of the employer incident to his property and business to free

access of such employees, what can be done to reconcile the conflicting interests?

Each case must turn on its own circumstances. . . . We think that the strikers and their sympathizers engaged in the economic struggle should be limited to one representative for each point of ingress and egress in the plant or place of business and that all others be enjoined from congregating or loitering at the plant or in the neighboring streets by which access is had to the plant, that such representation should have the right of observation, communication and persuasion but with special admonition that their communication, arguments and appeals shall not be abusive, libelous or threatening, and that they shall not approach individuals together but singly, and shall not in their single efforts at communication or persuasion obstruct an unwilling listener by importunate following or dogging his steps. This is not laid down as a rigid rule, but only as one which should apply to this case under the circumstances disclosed by the evidence and which may be varied in other cases. . . .

The second important question in the case is as to the form of decree against the Tri-City Central Trades Council and the other defendants. What has been said as to picketing applies to them . . . but how as to the injunction against persuasion?

The argument made on behalf of the American Foundries in support of enjoining persuasion is that the Tri-City Central Trades Council and the other defendants being neither employees nor strikers were intruders into the controversy, and were engaged without excuse in an unlawful conspiracy to injure the American Foundries by enticing its employees, and, therefore, should be enjoined.

It is to be noted, that while there was only one member of the unions of the Trades Council who went out in the strike, the number of skilled employees then engaged by the Foundries was not one-quarter of the whole number of men who would be engaged when it was in full operation. . . . It is thus probable that members of the local unions were looking forward to employment when complainant should resume full operation and even though they were not ex-employees within the Clayton Act, they were directly interested in the wages which were to be paid.

Is interference of a labor organization by persuasion and appeal to induce a strike against low wages under such circumstances without lawful excuse and malicious? We think not. . . . The strike becomes a lawful instrument in a lawful economic struggle or competition between employer and employees as to the share or division between them of the joint product of labor and capital. To render this combination at all effective, employees must make their combination extend be-

yond one shop. . . . Therefore, they may use all lawful propaganda to enlarge their membership and especially among those whose labor at lower wages will injure their whole guild. It is impossible to hold such persuasion and propaganda without more, to be without excuse and malicious. . . .

MR. JUSTICE BRANDEIS concurs in substance in the opinion and the judgment of the Court.

MR. JUSTICE CLARKE dissents.

NOTE TO THE TRI-CITY COUNCIL CASE

The language of the opinion discussing the application for an injunction against persuasion by the Tri-City Council would seem to limit the application of the *Duplex Case*. The learned Chief Justice, however, in commenting on that case said that the International Association of Machinists "conducted in the City of New York a campaign of threatening the customers of the Printing Press Company, the trucking companies that carried its presses, and those who were engaged in the work of setting up such presses, with injury to them in their business, if they continued to deal with the Duplex Company or its presses. It was a palpable effort on the part of the International Association of Machinists to institute a secondary boycott, that is, by coercion, to use the right of trade of persons having nothing to do with the controversy between the Duplex Company and the Machinists' Union, and having no interest in it, to injure the Duplex Company in its interstate trade." Consequently, the case "can have no bearing here." 257 U.S. 184, 212.

UNITED LEATHER WORKERS v. HERKERT.

Supreme Court of the United States. 1924.
265 U.S. 457.

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.

This suit was begun by a bill in equity filed in the District Court for the Eastern District of Missouri by the Herkert & Meisel Trunk Company and four others, all corporations of Missouri, engaged in making trunks and leather goods in St. Louis, against the United Leather Workers Union, Local Lodge or Union No. 66, an unincorporated association, its officers and agents and a number of its members. The bill averred that each of the complainants had built up a valuable busi-

ness in making, selling and shipping in interstate commerce trunks and leather goods, that each received large quantities of raw materials by interstate commerce, that on February 28, 1920, defendants demanded that their shops be unionized and conducted as closed shops and announced that if complainants refused they would ruin the interstate commerce business of each of them, that on April 20, 1920, the defendants began a strike, assaulted and threatened complainants' employees, and intimidated them so as to force them against their wills to quit complainants' employment. . . . The bill charged mass picketing and intimidation, that the interference with complainants' interstate commerce was intentional and malicious and was intended to destroy it, that it was in violation of the Anti-Trust Law and the Clayton Act, and that they had already inflicted, and unless restrained would continue to inflict, irreparable injury upon such business. The prayer was for a temporary and then a final injunction. . . . The District Court granted a final decree enjoining defendants as prayed. The case was taken on appeal to the Circuit Court of Appeals where the decree of the District Court was affirmed, one Judge dissenting. . . .

The sole question here is whether a strike against manufacturers by their employees, intended by the strikers to prevent, through illegal picketing and intimidation, continued manufacture, and having such effect, was a conspiracy to restrain interstate commerce under the Anti-Trust Act because such products when made were, to the knowledge of the strikers, to be shipped in interstate commerce in the absence of evidence that the strikers interfered or attempted to interfere with the free transport and delivery of the products from the factories to their destination in other States, or with the sale in those States.

We think that this question has already been answered in the negative by this Court. In *United Mine Workers v. Coronado Co.*, 259 U.S. 344, a coal mining company in Arkansas changed its arrangement with its employees from a closed shop to an open shop. The local union resented the change and the avowed purpose of the company to protect non-union employees by armed guards. Violence, murder and arson were resorted to by the union. Seventy-five per cent. of the output of the mine was to be shipped out of the State and a car of coal prepared for interstate shipment was destroyed by the mob of strikers and their sympathizers. . . . The language of the Court was (p. 407):

"Coal mining is not interstate commerce, and the power of Congress does not extend to its regulation as such. . . . Obstruction to coal mining is not a direct obstruction to interstate commerce in coal, although it, of course, may affect it by reducing the amount of coal to be carried in that commerce."

The Circuit Court of Appeals seems first to have based its conclusion

on cases like *Rearick v. Pennsylvania*, 203 U.S. 507 and *Robbins v. Shelby Taxing District*, 120 U.S. 489, 497. These dealt directly with the sale of goods in interstate commerce. They were cases of state taxation upon the solicitation and acceptance of orders to be sent from one State to another. . . . It is a far cry from such cases to a strike to induce the employers to make better terms with their employees when no interference with the transportation or future sale of the goods by the strikers is attempted or shown.

The Circuit Court of Appeals found further justification for its conclusion in cases like *Eureka Pipe Line Co. v. Hallanan*, 257 U.S. 265, and *Lemke v. Farmers Grain Co.*, 258 U.S. 50. They present the practical conception of interstate commerce elaborated in *Swift & Co. v. United States*, 196 U.S. 375. . . . Thus in the *Pipe Line Company* and *Gas Company Cases*, the State of West Virginia sought to tax a stream of oil and gas flowing constantly through the State and out of it. . . . The burden and invasion of interstate commerce was direct. . . .

In *Lemke v. Farmers Grain Co.*, a state law of North Dakota subjected the purchase price of all grain flowing in a regular course of business from that State to the market in Minneapolis, Minnesota, to a North Dakota inspector who was required to fix the price. . . . This was held to be a direct burden and restraint upon the interstate commerce in the grain from one State to another. . . .

None of these cases, although they illustrate the practical conception of interstate commerce as a flowing stream from one State to another formed by a regular course of business, can properly be said to support the argument that mere intentional cutting down of manufacture or production is a direct restraint of commerce in the product intended to be shipped when ready, or to be any departure from the general rule last announced in the *Coronado Case* and uniformly applied in all the cases referred to above, which it followed. . . .

Then the Circuit Court of Appeals found sustaining precedent in *Swift & Co. v. United States*, 196 U.S. 375. . . . This Court held that such a conspiracy was a violation of the Federal Anti-Trust Law because it was an intended obstruction to the flow of interstate commerce which Congress in the Anti-Trust Law intended to keep free and untrammelled. . . . The case rested wholly on the probably effective intent of the conspirators directed against interstate commerce.

The case of the *Addyston Pipe Co. v. United States*, 175 U.S. 211, was an agreement between those who made and sold iron pipe in different States to fix prices as between themselves and not sell and deliver pipe from their foundries across state lines in competition with each other. Their intent and ability to control prices and prevent the public from

having the benefit of competition in interstate trade brought them within the Federal Anti-Trust Act. . . .

The *Knight Case* [*United States v. E. C. Knight Co.*, 156 U.S. 1] has been looked upon by many as qualified by subsequent decisions of this Court. The case is to be sustained only by the view that there was no proof of steps to be taken with intent to monopolize or restrain interstate commerce in sugar, but only proof of the acquisition of stock in sugar manufacturing companies to control its making. As intimated in the *Swift Case* (196 U.S. 397), the *Knight Case* was very near the line. . . . The *Knight Case* emphasizes the difference between manufacture and interstate commerce. But the *Knight Case* was a far stronger case for federal jurisdiction under the Anti-Trust Law, because of the probable relation between the monopoly of manufacture and sale in interstate commerce, than the case at bar, in which there is present no element of intended and probable monopoly or discrimination in interstate commerce. The same element was lacking in the *Coronado Case*.

In *Loewe v. Lawlor*, 208 U.S. 274, and in *Duplex Co. v. Deering*, 254 U.S. 443, members of labor unions having a controversy with their employers sought to embarrass the sales by their employers of the product of their manufacture in other States by boycott and otherwise. They were held guilty of a conspiracy against interstate commerce because of their palpable intent to achieve their purpose by direct obstruction of that commerce.

The cases of *Stafford v. Wallace*, 258 U.S. 495, and *Chicago Board of Trade v. Olsen*, 262 U.S. 1, are also supposed in some way to sustain the view that a strike against the manufacture of commodities intended to be shipped in interstate commerce is a conspiracy against that commerce. What those cases decided was that when Congress found from investigation that more or less constant abusive practices and a course of business, usually only within state police cognizance, threatened to obstruct or unduly to burden the freedom of interstate commerce, it could by law institute supervision of such course of business in order to prevent the abuses having such effect. . . .

This review of the cases makes it clear that the mere reduction in the supply of an article to be shipped in interstate commerce, by the illegal or tortious prevention of its manufacture, is ordinarily an indirect and remote obstruction of that commerce. It is only when the intent or necessary effect upon such commerce in the article is to enable those preventing the manufacture to monopolize the supply, control its price or discriminate as between its would-be purchasers, that the unlawful interference with its manufacture can be said directly to burden interstate commerce.

The record is entirely without evidence or circumstance to show

that the defendants in their conspiracy to deprive the complainants of their workers were thus directing their scheme against interstate commerce. It is true that they were, in this labor controversy, hoping that the loss of business in selling goods would furnish a motive to the complainants to yield to demands in respect to the terms of employment; but they did nothing which in any way directly interfered with the interstate transportation or sales of the complainants' product:

We concur with the dissenting Judge in the Circuit Court of Appeals when, in speaking of the conclusion of the majority, he said: "The natural, logical and inevitable result will be that every strike in any industry or even in any single factory will be within the Sherman Act and subject to federal jurisdiction provided any appreciable amount of its product enters into interstate commerce." (284 Fed. 446, 464.)

We can not think that Congress intended any such result in the enactment of the Anti-Trust Act or that the decisions of this Court warrant such construction.

MR. JUSTICE McKENNA, MR. JUSTICE VAN DEVANTER, and MR. JUSTICE BUTLER, dissent.

BEDFORD CUT STONE CO. v. JOURNEYMEN STONE CUTTER'S ASS'N., 274 U.S. 37 (1927). MR. JUSTICE SUTHERLAND delivered the opinion of the Court. . . . The facts, so far as necessary to be stated, follow. Limestone produced by petitioners is quarried and fabricated largely for building construction purposes. . . . Part of this product is shipped directly to buildings, where it is fitted, trimmed and set in place, the remainder being sold in the rough to contractors to be fabricated. The stone sold in interstate commerce comes into competition with other kinds of natural and artificial stone. The principal producers of artificial stone are unionized and are located outside of Indiana. Before 1921, petitioners carried on their work in Indiana under written agreement with the General Union, but since that time they have operated under agreements with unaffiliated unions, with the effect of closing their shops and quarries against the members of the General Union and its locale. Prior to the filing of the bill of complaint, the General Union issued a notice to all its locals and members, directing its members not to work on stone "that has been started—planed, turned, cut, or semi-finished—by men working in opposition to our organization"

The rule requiring members to refrain from working on "unfair" stone was persistently adhered to and effectively enforced in a large number of cities and in many States. . . .

From a consideration of all the evidence, it is apparent that the enforcement of the general order to strike against petitioners' product

could have had no purpose other than that of coercing or inducing the local employers to refrain from purchasing the product. . . .

That the means adopted to bring about the contemplated restraint of commerce operated after physical transportation had ended is immaterial. *Loewe v. Lawlor*, 208 U.S. 274, 301. . . . The product against which the strikes were directed, it is true, had come to rest in the respective localities to which it had been shipped, so that it had ceased to be a subject of interstate commerce, . . . and interferences for a purely local object with its use, with no intention, express or implied, to restrain interstate commerce, it may be assumed, would not have been a violation of the Anti-Trust Act. . . . But these interferences were not thus in pursuit of a local motive,—they had for their primary aim restraint of the interstate sale and shipment of the commodity. . . . In other words, strikes against the local use of the product were simply the means adopted to effect the unlawful restraint. And it is this result, not the means devised to secure it, which gives character to the conspiracy. . . .

The case, therefore, is controlled, not by *United Mine Workers v. Coronado Co.*, *supra*, [259 U.S. 344,] and *United Leather Workers v. Herkert*, 265 U.S. 457, as respondents contend, but by others presently to be discussed. . . .

With a few changes in respect of the product involved, dates, names and incidents, which would have no effect upon the principles established, the opinion in *Duplex Co. v. Deering*, *supra*, [254 U.S. 443,] might serve as an opinion in this case. . . .

MR. JUSTICE SANFORD, concurring.

I concur in this result upon the controlling authority of *Duplex Company v. Deering*, 254 U.S. 443, 478, which, as applied to the ultimate question is this case, I am unable to distinguish.

The separate opinion of MR. JUSTICE STONE.

As an original proposition, I should have doubted whether the Sherman Act prohibited a labor union from peaceably refusing to work upon material produced by non-union labor or by a rival union, even though interstate commerce were affected. In the light of the policy adopted by Congress in the Clayton Act, with respect to organized labor, and in the light of *Standard Oil Co. v. United States*, 221 U.S. 1; *United States v. American Tobacco Co.*, 221 U.S. 106, 178-180, I should not have thought that such action as is now complained of was to be regarded as an unreasonable and therefore prohibited restraint of trade.

But in *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, these views were rejected by a majority of the court. . . . These views, which I should not have hesitated to apply here, have now been rejected again largely on the authority of the *Duplex* case. For that reason alone, I concur with the majority.

MR. JUSTICE BRANDEIS, dissenting

If, in the struggle for existence, individual workingmen may, under any circumstances, co-operate in this way for self-protection even though the interstate trade of another is thereby restrained, the lower courts were clearly right in denying the injunction sought by plaintiffs. . . . For it has long been settled that only unreasonable restraints are prohibited by the Sherman Law. . . . And the restraint imposed was, in my opinion, a reasonable one. The Act does not establish the standard of reasonableness. What is reasonable must be determined by the application of principles of the common law, as administered in federal courts unaffected by state legislation or decisions. . . . Tested by these principles, the propriety of the unions' conduct can hardly be doubted by one who believes in the organization of labor. . . .

The plaintiffs are not weak employers opposed by a mighty union. They have large financial resources. Together, they ship 70 per cent. of all the cut stone in the country. They are not isolated concerns. They had combined in a local employers' organization. And their organization is affiliated with the national employers' organization. . . . Standing alone, each of the 150 Journeymen's locals is weak. The average number of members is only 33. The locals are widely scattered throughout the country. . . . It is only through combining the 5,000 organized stonecutters in a national union, and developing loyalty to it, that the individual stonecutter anywhere can protect his own job.

The manner in which these individual stonecutters exercised their asserted right to perform their union duty by refusing to finish stone "cut by men working in opposition to" the Association was confessedly legal. . . .

The manner in which the Journeymen's unions acted was also clearly legal. . . .

The contention that earlier decisions of this Court compel the conclusion that it is illegal seems to me unfounded. The cases may support the claim that, by such local abstention from work, interstate trade is restrained. But examination of the facts in those cases makes clear that they have no tendency whatsoever to establish that the restraint imposed by the unions in the case at bar is unreasonable. The difference between the simple refraining from work practiced here, and the conduct held

unreasonable in *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, appears from a recital in that opinion of the defendants' acts. . . .

The difference between the facts here involved and those in the *Duplex* case does not lie only in the character of the acts complained of. It lies also in the occasion and purpose of the action taken and in the scope of the combination. The combination there condemned was not, as here, the co-operation for self-protection only of men in a single craft. It was an effort to win by invoking the aid of others, both organized and unorganized, not concerned in the trade dispute. The conduct there condemned was not, as here, a mere refusal to finish particular work begun "by men working in opposition to" the union. It was the institution of a general boycott, not only of the business of the employer, but of the businesses of all who should participate in the marketing, installation or exhibition of its product. The conduct there condemned was not, as here, action taken for self-protection against an opposing union installed by employers to destroy the regular union with which they long had had contracts. The action in the *Duplex* case was taken in an effort to unionize an open shop. Moreover, there the combination of defendants was aggressive action directed against an isolated employer. Here it is defensive action of workingmen directed against a combination of employers. The serious question on which the Court divided in the *Duplex* case was not whether the restraint imposed was reasonable. It was whether the Clayton Act had forbidden federal courts to issue an injunction in that class of cases. . . .

Members of the Journeymen Stone Cutters' Association could not work anywhere on stone which had been cut at the quarries by "men working in opposition" to it, without aiding and abetting the enemy. Observance by each member of the provision of their constitution which forbids such action was essential to his own self-protection. . . . If, on the undisputed facts of this case, refusal to work can be enjoined, Congress created by the Sherman Law and the Clayton Act an instrument for imposing restraints upon labor which reminds of involuntary servitude. The Sherman Law was held in *United States v. United States Steel Corporation*, 251 U.S. 417, to permit capitalists to combine in a single corporation 50 per cent. of the steel industry of the United States dominating the trade through its vast resources. The Sherman Law was held in *United States v. United Shoe Machinery Co.*, 247 U.S. 32, to permit capitalists to combine in another corporation practically the whole shoe machinery industry of the country, necessarily giving it a position of dominance over shoe-manufacturing in America. It would, indeed, be strange if Congress had by the same Act willed to deny to members of a small craft of workingmen the right to co-operate in simply refraining from work, when that course was the only means of

self-protection against a combination of militant and powerful employers. I cannot believe that Congress did so.

MR. JUSTICE HOLMES concurs in this opinion.

The Injunctive Process

IN RE DEBS, 158 U.S. 564 (1895). Original. MR. JUSTICE BREWER. . . . Two questions of importance are suggested: First. Are the relations of the general government to interstate commerce and the transportation of the mails such as to authorize a direct interference to prevent a forcible obstruction thereof? Second. If authority exists . . . has a court of equity jurisdiction to issue an injunction in aid of the performance of such duty?

First. . . . [The Court answers the first question affirmatively.]

But passing to the second question, is there no other alternative than the use of force on the part of the executive authorities whenever obstructions arise to the freedom of interstate commerce or the transportation of the mails? Is the army the only instrument by which rights of the public can be enforced and the peace of the nation preserved? Grant that any public nuisance may be forcibly abated either at the instance of the authorities, or by any individual suffering private damage therefrom, the existence of this right of forcible abatement is not inconsistent with nor does it destroy the right of appeal in an orderly way to the courts for a judicial determination, and an exercise of their powers by writ of injunction and otherwise to accomplish the same result. . . .

So, in the case before us, the right to use force does not exclude the right of appeal to the courts for a judicial determination and for the exercise of all their powers of prevention. . . .

We have given to this case the most careful and anxious attention, for we realize that it touches closely questions of supreme importance to the people of this country. Summing up our conclusions, we hold . . . that the jurisdiction of courts to interfere in such matters by injunction is one recognized from ancient times and by indubitable authority; that such jurisdiction is not ousted by the fact that the obstructions are accompanied by or consist of acts in themselves violations of the criminal law; that the proceeding by injunction is of a civil character, and may be enforced by proceedings in contempt; that such proceedings are not in execution of the criminal laws of the land. . . .

DUPLEX PRINTING PRESS CO. v. DLERING.

Supreme Court of the United States. 1921.

254 U.S. 443.

MR. JUSTICE PITNEY delivered the opinion of the court.

This was a suit in equity for an injunction to restrain a course of conduct carried on by defendants in maintaining a boycott against the products of complainant's factory, in furtherance of a conspiracy to injure and destroy its good will, trade, and business—especially to obstruct and destroy its interstate trade. . . . Complainant is a Michigan corporation and manufactures printing presses at a factory in Battle Creek, in that State. . . . The defendants are Emil J. Deering and William Bramley, sued individually and as business agents and representatives of District No. 15 of the International Association of Machinists, and Michael T. Neyland, sued individually and as business agent and representative of Local Lodge No. 328 of the same association. . . .

. . . . Complainant conducts its business on the "open shop" policy, without discrimination against either union or non-union men. Complainant's principal manufacture is newspaper presses of large size and complicated mechanism, and requiring a considerable force of labor and a considerable expenditure of time—a week or more—to handle, haul and erect them at the point of delivery. . . . The acts complained of and sought to be restrained have nothing to do with the conduct or management of the factory in Michigan, but solely with the installation and operation of the presses by complainant's customers. None of the defendants is or ever was an employee of complainant, and complainant at no time has had relations with either of the organizations that they represent. . . . The acts embraced the following, with others: warning customers that it would be better for them not to purchase, or having purchased not to install, presses made by complainant, and threatening them with loss should they do so; threatening customers with sympathetic strikes in other trades; notifying a trucking company usually employed by customers to haul the presses not to do so, and threatening it with trouble if it should; inciting employees of the trucking company to strike; notifying repair shops not to do repair work on Duplex presses; coercing union men by threatening them with loss of union cards and with being blacklisted as "scabs" if they assisted in installing the presses; In some cases the threats were disguised in other cases polite in form but none the less sinister in purpose and effect. . . .

That complainant's business of manufacturing printing presses and disposing of them in commerce is a property right, entitled to protection against unlawful injury or interference; that unrestrained access to the channels of interstate commerce is necessary for the successful conduct of the business; that a widespread combination exists . . . to hinder and obstruct complainant's interstate trade and commerce by the means that have been indicated; and that as a result of it complainant has sustained substantial damage to its interstate trade . . . is proved by clear and undisputed evidence. Hence the right to an injunction is clear if the threatened loss is due to a violation of the Sherman Act as amended by the Clayton Act. . . .

The substance of matters here complained of is an interference with complainant's interstate trade . . . produced by what is commonly known as a "secondary boycott," that is, a combination not merely to refrain from dealing with complainant, or to advise or by peaceful means persuade complainant's customers to refrain ("primary boycott"), but to exercise coercive pressure upon such customers, actual or prospective, in order to cause them to withhold or withdraw patronage from complainant through fear of loss or damage to themselves should they deal with it.

As we shall see, the recognized distinction between a primary and a secondary boycott is material to be considered upon the question of the proper construction of the Clayton Act. . . .

It is settled . . . that such a restraint produced by peaceable persuasion is as much within the prohibition as one accomplished by force or threats of force; and it is not to be justified by the fact that the participants in the combination or conspiracy may have some object beneficial to themselves or to their associates. . . .

The principal reliance [of defendants] is upon # 20 [of the Clayton Act]. This regulates the granting of restraining orders and injunctions by the courts of the United States in a designated class of cases, with respect to (a) the terms and conditions of the relief and the practice to be pursued, and (b) the character of acts that are to be exempted from the restraint; and in the concluding words it declares (c) that none of the acts specified shall be held to be violations of any law of the United States. All its provisions are subject to a general qualification respecting the nature of the controversy and the parties affected. It is to be a "case between an employer and employees, . . . or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment."

The first paragraph merely puts into statutory form familiar restric-

tions upon the granting of injunctions already established and of general application in the equity practice of the courts of the United States. . . . The second paragraph declares that "no *such* restraining order or injunction" shall prohibit certain conduct specified—manifestly still referring to a "case between an employer and employees, . . . involving, or growing out of, a dispute concerning terms or conditions of employment," as designated in the first paragraph. It is very clear that the restriction upon the use of the injunction is in favor only of those concerned as parties to such a dispute as is described. . . . If the qualifying words are to have any effect, they must operate to confine the restriction upon the granting of injunctions, and also the relaxation of the provisions of the anti-trust and other laws of the United States, to parties standing in proximate relation to a controversy such as is particularly described.

The majority of the Circuit Court of Appeals appear to have entertained the view that the words "employers and employees," as used in # 20, should be treated as referring to "the business class or clan to which the parties litigant respectively belong"; . . .

We deem this construction altogether inadmissible. Section 20 must be given full effect according to its terms as an expression of the purpose of Congress; but it must be borne in mind that the section imposes an exceptional and extraordinary restriction upon the equity powers of the courts of the United States and upon the general operation of the anti-trust laws, a restriction in the nature of a special privilege or immunity to a particular class, with corresponding detriment to the general public; and it would violate rules of statutory construction having general application and far-reaching importance to enlarge that special privilege by resorting to a loose construction of the section, not to speak of ignoring or slighting the qualifying words that are found in it. . . . The extensive construction adopted by the majority of the court below virtually ignores the effect of the qualifying words. . . .

Nor can # 20 be regarded as bringing in all members of a labor organization as parties to a "dispute concerning terms or conditions of employment" which proximately affects only a few of them, with the result of conferring upon any and all members,—no matter how many thousands there may be, nor how remote from the actual conflict—those exemptions which Congress in terms conferred only upon parties to the dispute. That would enlarge by construction the provisions of # 20. . . . At the same time it would virtually repeal the prohibition of the Sherman Act, so far as labor organizations are concerned, notwithstanding repeals by implication are not favored. . . .

The extreme and harmful consequences of the construction adopted in the court below are not to be ignored. The present case furnishes an

apt and convincing example. An ordinary controversy in a manufacturing establishment said to concern the terms and conditions of employment there, has been held a sufficient reason for imposing a general embargo upon the products of the establishment and a nation-wide blockade of the channels of interstate commerce against them to the great and incalculable damage of many innocent people far remote from any connection with or control over the original and actual dispute—people constituting, indeed, the general public. . . .

There should be an injunction against defendants and the associations represented by them, and all members of those associations, restraining them, according to the prayer of the bill. . . .

MR. JUSTICE BRANDEIS, dissenting, with whom MR. JUSTICE HOLMES and MR. JUSTICE CLARKE concur. . . .

The change in the law by which strikes once illegal and even criminal are now recognized as lawful was effected in America largely without the intervention of legislation. This reversal of a common-law rule was not due to the rejection by the courts of one principle and the adoption in its stead of another, but to a better realization of the facts of industrial life. When centralization in the control of business brought its corresponding centralization in the organization of workingmen, new facts had to be appraised. A single employer might, as in this case, threaten the standing of the whole organization and the standard of all its members; and when he did so the union, in order to protect itself, would naturally refuse to work on his materials wherever found. . . .

So, in the case at bar, deciding a question of fact upon the evidence introduced and matters of common knowledge, I should say, as the two lower courts apparently have said, that the defendants and those from whom they sought co-operation have a common interest which the plaintiff threatened. . . .

Second. As to the anti-trust laws of the United States: Section 20, of the Clayton Act, declares,—

“Nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.”

The acts which are thus referred to are, whether performed singly or in concert,—“Terminating any relation of employment, or ceasing to perform any work or labor, or recommending, advising, or persuading others by peaceful means so to do; or attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or peacefully persuading any person to work or to abstain from working; or ceasing to patronize or to employ any party to such dispute; or

. . . . recommending, advising, or persuading others by peaceful and lawful means so to do; or paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or peaceably assembling in a lawful manner, and for lawful purposes; or doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto."

This statute was the fruit of unceasing agitation, which extended over more than twenty years and was designed to equalize before the law the position of workmen and employer as industrial combatants. Aside from the use of the injunction, the chief source of dissatisfaction with the existing law lay in the doctrine of malicious combination, and, in many parts of the country, in the judicial declarations of the illegality at common law of picketing and persuading others to leave work. The grounds for objection to the latter are obvious. The objection to the doctrine of malicious combinations requires some explanation. By virtue of that doctrine, damage resulting from conduct such as striking or withholding patronage or persuading others to do either, which without more might be *damnum absque injuria* because the result of trade competition, became actionable when done for a purpose which a judge considered socially or economically harmful and therefore branded as malicious and unlawful. It was objected that, due largely to environment, the social and economic ideas of judges, which thus became translated into law, were prejudicial to a position of equality between workman and employer; that due to this dependence upon the individual opinion of judges great confusion existed as to what purposes were lawful and what unlawful; and that in any event Congress, not the judges, was the body which should declare what public policy in regard to the industrial struggle demands.

By 1914 the ideas of the advocates of legislation had fairly crystallized upon the manner in which the inequality and uncertainty of the law should be removed. It was to be done by expressly legalizing certain acts regardless of the effects produced by them upon other persons. As to them Congress was to extract the element of *injuria* from the damages thereby inflicted, instead of leaving judges to determine according to their own economic and social views whether the damage inflicted on an employer in an industrial struggle was *damnum absque injuria*, because an incident of trade competition, or a legal injury, because [*sic*; became?] in their opinion, economically and socially objectionable. This idea was presented to the committees which reported the Clayton Act. The resulting law set out certain acts which had previously been held unlawful, whenever courts had disapproved of the ends for which they were performed; it then declared that, when these acts were committed

in the course of an industrial dispute, they should not be held to violate any law of the United States. In other words the Clayton Act substituted the opinion of Congress as to the propriety of the purpose for that of differing judges; and thereby it declared that the relations between employers of labor and workingmen were competitive relations, that organized competition was not harmful and that it justified injuries necessarily inflicted in its course. . . . If, therefore, the act applies to the case at bar, the acts here complained of cannot "be considered or held to be violations of any law of the United States," and, hence, do not violate the Sherman Act.

The Duplex Company contends that # 20 of the Clayton Act does not apply to the case at bar, because it is restricted to cases "between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment"; whereas the case at bar arises between an employer in Michigan and workingmen in New York not in its employ, and does not involve their conditions of employment. But Congress did not restrict the provision to employers and workingmen *in their employ*. By including "employers and employees" and "persons employed and persons seeking employment" it showed that it was not aiming merely at a legal relationship between a specific employer and his employees. Furthermore, the plaintiff's contention proves too much. If the words are to receive a strict technical construction, the statute will have no application to disputes between employers of labor and workingmen, since the very acts to which it applies sever the continuity of the legal relationship. . . . The further contention that this case is not one arising out of a dispute concerning the conditions of work of one of the parties is, in my opinion, founded upon a misconception of the facts.

Because I have come to the conclusion that both the common law of a State and a statute of the United States declare the right of industrial combatants to push their struggle to the limits of the justification of self-interest, I do not wish to be understood as attaching any constitutional or moral sanction to that right. All rights are derived from the purposes of the society in which they exist; above all rights rises duty to the community. But it is not for judges to determine whether such conditions exist, nor is it their function to set the limits of permissible contest and to declare the duties which the new situation demands. This is the function of the legislature which, while limiting individual and group rights of aggression and defense, may substitute processes of justice for the more primitive method of trial by combat.

NEW NEGRO ALLIANCE *v.* SANITARY GROCERY CO.

Supreme Court of the United States. 1938.
303 U.S. 552.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

The matter in controversy is whether the case made by the pleadings involves or grows out of a labor dispute within the meaning of \S 13 of the Norris-La Guardia Act.

The respondent . . . sought an injunction restraining the petitioners and their agents from picketing its stores and engaging in other activities injurious to its business . . . and an injunction was awarded. . .

. . . Respondent, a Delaware corporation, operates 255 retail grocery, meat, and vegetable stores, a warehouse and a bakery in the District of Columbia and employs both white and colored persons. April 3, 1936, it opened a new store at 1936 Eleventh Street, N. W., installing personnel having an acquaintance with the trade in the vicinity. Petitioner, The New Negro Alliance, is a corporation composed of colored persons, organized for the mutual improvement of its members and the promotion of civic, educational, benevolent, and charitable enterprises. . . . The relation of employer and employes does not exist between the respondent and the petitioners or any of them. The petitioners are not engaged in any business competitive with that of the respondent, and . . . are not engaged in the same business or occupation as the respondent or its employes.

As to other matters of fact, the state of the pleadings may be briefly summarized. The bill asserts: the petitioners have made arbitrary and summary demands upon the respondent that it engage and employ colored persons in managerial and sales positions in the new store and in various other stores; it is essential to the conduct of the business that respondent employ experienced persons in its stores and compliance with the arbitrary demands of defendants would involve the discharge of white employes and their replacement with colored. . . . The answer admits the respondent has not acceded to the petitioners' demands . . . and states that the Alliance and its agents have requested only that respondent, in the regular course of personnel changes in its retail stores, give employment to Negroes as clerks, particularly in those stores patronized largely by colored people. . . .

The bill further alleges that the petitioners and their authorized representatives "have unlawfully conspired with each other to picket, patrol, boycott, and ruin the Plaintiff's business in said stores, and particularly

in the store located at 1936 Eleventh Street, Northwest" the pickets carrying large placards charging respondent with being unfair to Negroes and reading: "Do your Part! Buy Where You Can Work! No Negroes Employed Here!" for the purpose of intimidating and coercing prospective customers. . . . "Said defendants, their pickets or patrols or some of them have jostled and collided with persons in front of the said store and have physically hindered, obstructed, interfered with, delayed, molested, and harassed persons desiring to enter the place. . . ." Four photographs alleged to portray the picketing are annexed as exhibits to the bill. One of them shows a man carrying a sandwich placard on the sidewalk and no one else within the range of the camera. In another, two children are seen beside the picket; in another, two adults; in the fourth, one adult entering respondent's store at a distance from the picket and without apparent interference. The answer denies all these allegations save that it admits the petitioners did, during April 4, 1936, and at no other time, cause the store at 1936 Eleventh Street, N. W., to be continuously picketed by a single person carrying a placard exhibiting the words quoted by the bill; and the petitioners, prior to the acts complained of in the bill, picketed, or expressed the intention of picketing, two other stores. . . . The answer avers the information carried on the placards was true, was not intended to, and did not in fact, intimidate customers; that there was no physical obstruction. . . .

The trial judge was of the view that the laws relating to labor disputes had no application to the case. He entered a decree enjoining the petitioners and their agents and employes from picketing or patrolling any of the respondent's stores, boycotting or urging others to boycott respondent. . . . The Court of Appeals thought that the dispute was not a labor dispute within the Norris-La Guardia Act because it did not involve terms and conditions of employment . . . and that the trial court, therefore, had jurisdiction to issue the injunction. We think the conclusion that the dispute was not a labor dispute within the meaning of the Act . . . is erroneous.

Subsection (a) of # 13 provides: "A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; . . . or when any case involves any conflicting or competing interests in a 'labor dispute' (as hereinafter defined) of 'persons participating or interested' therein (as hereinafter defined)." Subsection (b) characterizes a person or association as participating or interested in a labor dispute "if relief is sought against him or it and if he or it . . . has a direct or indirect interest therein, . . ." Subsection (c) defines the term "labor dispute" as including "any con-

troversty concerning terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee." These definitions plainly embrace the controversy which gave rise to the instant suit and classify it as one arising out of a dispute defined as a labor dispute. They leave no doubt that the New Negro Alliance and the individual petitioners are, in contemplation of the Act, persons interested in the dispute.

In quoting the clauses of # 13 we have omitted those that deal with disputes between employers and employes and disputes between associations of persons engaged in a particular trade or craft, and employers in the same industry. It is to be noted, however, that the inclusion in the definition of such disputes, and the persons interested in them, serves to emphasize the fact that the quoted portions were intended to embrace controversies other than those between employers and employes. . . .

The Act does not concern itself with the background or the motives of the dispute. The desire for fair and equitable conditions of employment on the part of persons of any race, color, or persuasion, and the removal of discriminations against them by reason of their race or religious beliefs is quite as important to those concerned as fairness and equity in terms and conditions of employment can be to trade or craft unions or any form of labor organization or association. . . .

The purpose and policy of the Act respecting the jurisdiction of the federal courts is set forth in ## 4 and 7. The former deprives those courts of jurisdiction to issue an injunction against, *inter alia*, giving publicity to the existence of, or the facts involved in, any labor dispute by any method not involving fraud or violence; against advising or notifying any person of an intention to do any of the acts specified. . . . Section 7 deprives the courts of jurisdiction to issue an injunction in any case involving or growing out of a labor dispute, except after hearing sworn testimony in open court in support of the allegations of the complaint, and upon findings of fact to the effect (a) that unlawful acts have been threatened and will be committed unless restrained, or have been committed and will be continued, unless restrained ; (b) that substantial and irreparable injury to complainant's property will follow; (c) that, as to each item of relief granted, greater injury will be inflicted upon the complainant by denial of the relief than will be inflicted on the defendant by granting it; (d) that complainant has no adequate remedy at law, and (e) that the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

The legislative history of the Act demonstrates that it was the purpose of the Congress further to extend the prohibitions of the Clayton Act respecting the exercise of jurisdiction by federal courts and to obviate

the results of the judicial construction of that Act. It was intended that peaceful and orderly dissemination of information by those defined as persons interested in a labor dispute concerning "terms and conditions of employment" in an industry or a plant or a place of business should be lawful; that, short of fraud, breach of the peace, violence, or conduct otherwise unlawful, those having a direct or indirect interest in such terms and conditions of employment should be at liberty to advertise and disseminate facts and information with respect to terms and conditions of employment, and peacefully to persuade others to concur in their views respecting an employer's practices. The District Court erred in not complying with the provisions of the Act. . . .

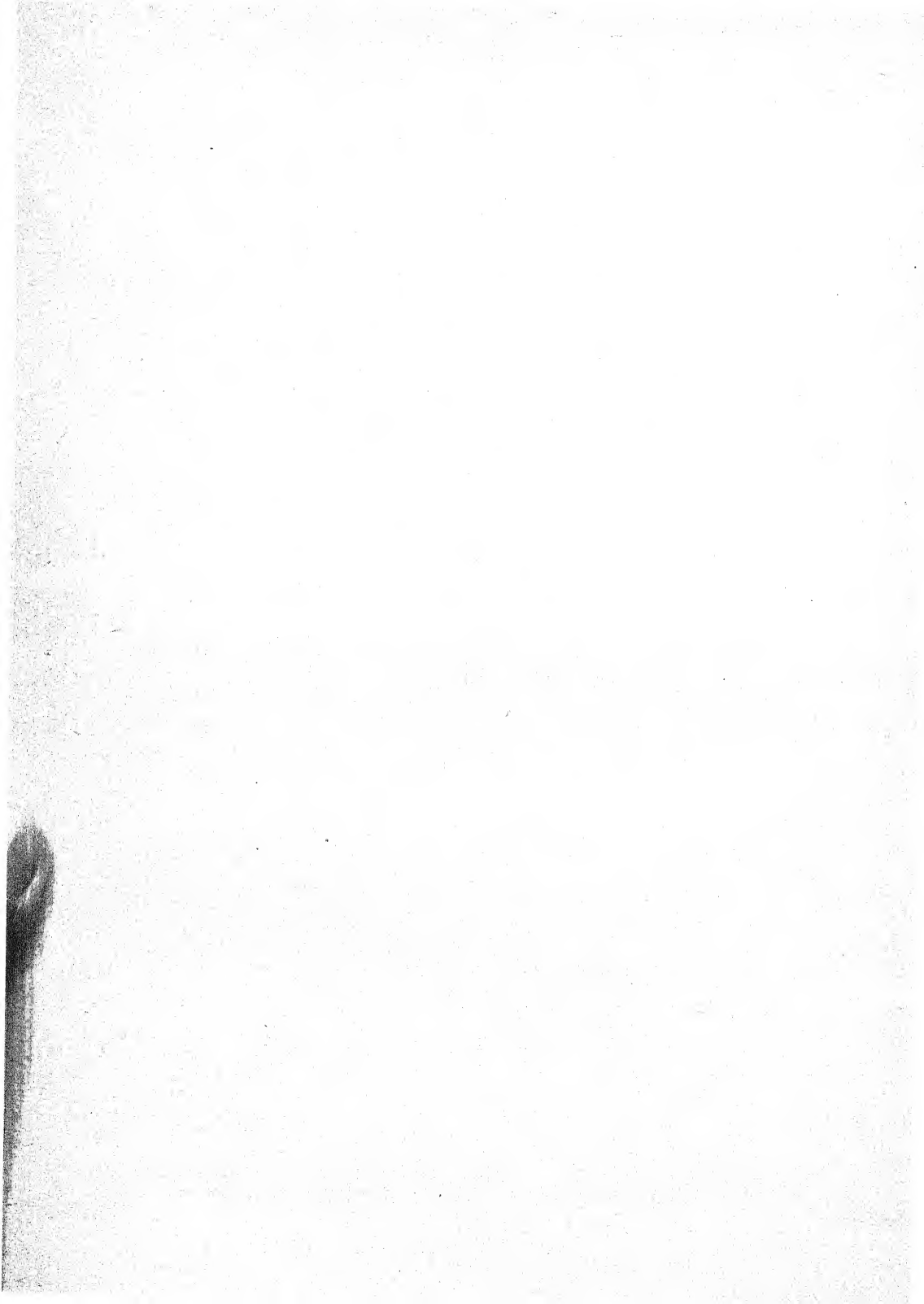
MR. JUSTICE CARDOZO took no part in the consideration or decision of this case.

MR. JUSTICE McREYNOLDS, dissenting.

MR. JUSTICE BUTLER and I cannot accept the view that a "labor dispute" emerges whenever an employer fails to respond to a communication from A, B and C—irrespective of their race, character, reputation, fitness, previous or present employment—suggesting displeasure because of his choice of employes and their expectation that in the future he will not fail to select men of their complexion.

It seems unbelievable that, in all such circumstances, Congress intended to inhibit courts from extending protection long guaranteed by law and thus, in effect, encourage mobbish interference with the individual's liberty of action. Under the tortured meaning now attributed to the words "labor dispute," no employer—merchant, manufacturer, cobbler, housekeeper or what not—who prefers helpers of one color or class can find adequate safeguard against intolerable violations of his freedom if members of some other class, religion, race or color demand that he give them precedence.

. . . . The ultimate result of the view now approved to the very people whom present petitioners claim to represent, it may be, is prefigured by the grievous plight of minorities in lands where the law has become a mere political instrument.



PART V

The Revision of Dogma

CHAPTER XI

The Federal Quasi-Police Power

FEDERAL PROTECTION OF THE GENERAL WELFARE

In strict constitutional theory, the federal government does not possess the police power in the sense that the states do. This is true because Congress may exert only those powers granted to it, and the police power is not one of them. The nearest approach to such a grant occurs in Article I, Section 8, Paragraph 1: "The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States. . . ." But here there is no grant of power to enact legislation of every sort for the advancement of the health, morals, safety, and general welfare of the nation. What is here is a grant of power to lay and collect taxes in order to provide for the general welfare.

Congress has, of course, from time immemorial legislated to protect some aspect of the public interest. It has done so by exerting one or another of the powers which it is authorized by the Constitution to use. It has, in other words, selected one of the granted powers with which its armory is stocked, and has used it for the good of the nation. The commerce power, for example, was placed in the Constitution by the framers of that instrument in order that Congress might foster commerce between the states and with foreign nations. The object of the commerce clause was commerce. But Congress has used the commerce power to suppress behavior which it has condemned as harmful to the people at large. Or, to take another illustration, Congress has used the taxing power to drive from the market the thing taxed, although the taxing power was put in the Constitution in order that the federal government might provide itself with a certain and adequate income. In the phraseology of the Supreme Court, such enactments have the quality of police legislation. If the commerce power is used to regulate the rates charged to the public by a railroad, that is an object which serves the public interest or the general welfare; but it does not have the quality of police legislation because the fixing of rates to be charged for transportation is one of the specific purposes for which this power was granted. Railroad rates are an element of the flow of commerce. But if the commerce power is used to compel producers of a patent medicine to put accurate labels on their

product, then that is police legislation. It is so because truthful advertising is not an intrinsic ingredient of commerce. It is a separate end not served by the commerce power naturally or inevitably.

It may be argued that since the police power is the power to protect the public welfare, the federal government possesses the police power because it has power to protect the public welfare. Such reasoning ignores the jurisprudence of the constitution, however, and the language of the cases is against it. The judicial terminology is not, as yet, either circumlocution or constitutional fiction. Whether or not the prevailing doctrine is to be maintained is quite a different question. The Supreme Court has since 1936 sustained unparalleled congressional regulation of the social and economic life of the country. The cumulative weight of these decisions, together with the reasoning on which they are based, may result in the reading into the Constitution of the police power as a power inherent in the functions of government in general, and therefore as inherent in the federal government. There is language in the New Deal cases which indicates such a trend. But until the Supreme Court decides to brush aside the "quasi-", the established doctrine must be presumed to control.

The Court brings to bear on federal welfare legislation the same concepts by which it tests the exertion of the police power of the states. The scope of review is just as broad in the former instance as it is in the latter. Because of this identity of treatment, the cases in the present chapter are not classified under the conventional police headings. They have been selected and grouped to outline the distinction between the two jurisdictions and to reveal the special problems of construction which the presence of the enumerated powers imposes on the Court. To these cases we now turn.

The value of the interstate commerce clause is that it enables Congress to control transactions which cross state borders. Because federal law is paramount over state legislation, the commerce power may be used to discharge a double function: it may be exerted to inhibit or to protect the internal policy of a state, and it may be used to govern the operations of the citizens of the several states. From this point of view, it is the most important of the federal powers. The cases under this clause begin with *Clark Distilling Co. v. Western Maryland Ry. Co.* because the controversy adjudicated there arises from the general nature of the Union. The West Virginian government had undoubted power to regulate the manufacture and sale of, and the traffic in intoxicating liquor within its borders. It had, however, no power to block the entry of liquor shipped in from other states. So much had been decided by *Leisy v. Hardin*, 135 U.S. 100 (1890), where an Iowa prohibition law was held bad as an

unconstitutional regulation of interstate commerce. The Court invited Congress to remove this disability from the states, and Congress responded by enacting the Wilson Act of 1890, which made intoxicating liquors shipped in interstate commerce subject to the police power immediately upon arrival within the state. This act was sustained by the decision in *In re Rabrer*, 140 U.S. 545 (1891). The Webb-Kenyon Act of 1913 was made necessary, though the Court does not notice it, by the decision in that case that arrival in the state meant delivery to the consignee. Congress made it clear in the latter act that arrival within the state meant entry into the state. The controlling question in cases on interstate transportation is, When does this transportation cease so that the goods transported become incorporated in the general mass of property within the state? The reason for this question is that such goods are beyond state jurisdiction as long as they are within the stream of interstate commerce. While transportation continues, the jurisdiction of Congress is exclusive. The issue, then, in the *Clark Distilling Co.* case was whether Congress could lift this immunity by subjecting such articles to state law before they had come to rest within the state.

Kentucky Whip & Collar Co. v. Illinois Central Railroad Co. adds to the list of designated articles which Congress may subject to state police regulation, or, at least, to police regulation of the character manifested in the liquor cases. The items here are horse collars, harness, and "strap goods," when made by convict labor. The principle contention of the manufacturer was that these goods were neither harmful in themselves, as are diseased cattle or obscene literature, nor did they cause harmful results, as do intoxicating liquors or lottery tickets; they were innocent, and therefore, it was argued, beyond the constitutional reach of Congress to exclude from interstate transportation. The decision goes the other way because the Court accepts the legislative judgment that the competition of convict-made goods with free goods in the open market has a baneful effect upon the public welfare. See *Whitfield v. Ohio*, in Chapter 5 in the section on the protection of labor.

In the next case, Congress' power to act directly to promote the public welfare is challenged. In the foregoing cases, Congress had done no more than to support state policy. By the Food and Drugs Act of 1912, Congress had prohibited, as the majority opinion in this case puts it, "interstate transportation in swindling preparations designed to cheat credulous sufferers." That the power to regulate includes the power to prohibit had been decided in *Champion v. Ames*, 188 U.S. 321 (1903), which had sustained a congressional act of 1895 for the suppression of the lottery traffic within the United States. In the instant case, the power

to prohibit receives some extension; it is construed to embrace "false and fraudulent statements" accompanying the article transported. The Court does not hold expressly that Eckman's Alternative is a noxious article. The offense is that it is a swindling preparation; and it is swindling because false claims for its curative properties are packaged with it.

Dayton-Goose Creek Ry. Co. v. United States is significant here because in the opinion of the Court the idea of commerce merges with that of the public interest in such a way as to make the latter idea dominant in the application of the commerce power to the support of "weak" railroads. The case falls technically in the line of decisions upholding the rate-making power of Congress, and specifically with those decisions which sustain the congressional power to regulate intrastate rates where these discriminate against interstate rates. The issue raised, however, is new: it is the reduction by law of the net operating profit of a railroad when that profit passes the level of a prescribed fair return.

In each of the following cases under the taxing power, Congress has had a motive other than that of collecting revenue for levying the tax in question.

In the *Doremus* case, the motive was to confine the sale of narcotics to authorized dealers. The special tax prescribed was small—one dollar. By itself it was too small to deter people from dealing in narcotic drugs. But payment of the fee had to be accompanied by registration and the issuance of a formal authorization.

The Court said that the decisive question in the case was: Have the provisions in question any relation to the raising of revenue? This is the controlling question for this class of cases.

In *McCray v. United States*, the tax challenged amounted to 10 cents a pound on oleomargarine colored to look like butter. McCray contended that the tax was so high that it would drive colored oleomargarine off the market. The issue of ulterior motive was squarely presented. The Court, however, refused not only to rule that the purpose was wrongful, but it refused to make any ruling on the purpose. There is some obscurity in the opinion as to just what the Court did do. Mr. Justice White accepted for the sake of the argument the proposition that the tax was so high that the oleomargarine could not be sold, and went on to say that the concession thus made was not controlling. He went on to observe, however, that the states could prohibit the manufacture of the article without violating due process because the article's coloration tended to deceive the public into thinking that it was butter; and he added that the same considerations applied in the present case. The opinion makes

this much clear: that since the tax was on its face a tax, the Constitution imposed no barrier to its collection.

In the *Child Labor Tax Case*, which comes next, the Court with only one dissent held that the tax law in question was not, on its face, a tax law, but a regulation of the employment of child labor. The Court could not presume validity, because the measure did not look like a tax. It was, both in law and in fact, a penalty.

The opinion in the *Sonzinsky* case contains a compact and usable summary of the decisions where taxation is used to regulate the object taxed.

Under the Commerce Power

CLARK DISTILLING CO. v. WESTERN MARYLAND RY. CO.

Supreme Court of the United States. 1917.
242 U.S. 311.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court. . . .

West Virginia in February, 1913, enacted a prohibition law. . . .

Under this statute and in reliance upon the provisions of the act of Congress known as the Webb-Kenyon Law (Act of Congress of March 1, 1913, 37 Stat. 699), the State of West Virginia in one of its courts sued the Western Maryland Railway Company and the Adams Express Company to enjoin them from carrying from Maryland into West Virginia liquor in violation of law. . . . Preliminary injunctions were issued. . . . With these injunctions in force, these suits were commenced by the Clark Distilling Company to compel the carriers to take a shipment of liquor . . . on the ground that the Act of Congress to Regulate Commerce imposed the duty to receive and carry. . . . West Virginia intervened in the suits, relying upon the state law and the injunctions which had been issued. . . .

The issues to be decided may be embraced in four propositions which we proceed separately to consider.

1. *The correct meaning of the West Virginia law as to the subjects in dispute.* . . .

. . . . As the relief sought is the permanent right to ship in the future, the meaning of the statute now, that is, as amended, is the test by which we must consider the questions requiring solution. . . .

2. *The power of the State to enact the prohibition law. . . .*

That government can, consistently with the due process clause, forbid the manufacture and sale of liquor and regulate its traffic, is not open to controversy. . . .

But that it was a direct burden upon interstate commerce and conflicted with the power of Congress to regulate commerce among the several states, and therefore could not be used to prevent interstate shipments from Maryland into West Virginia, has not been open to question since the decision in *Leisy v. Hardin*, 135 U.S. 100. And this brings us to consider whether the Webb-Kenyon Law has so regulated interstate commerce as to give the State the power to do what it did in enacting the prohibition law. . . .

3. *Assuming the constitutionality of the Webb-Kenyon Act, what is its true meaning and its operation. . . . ?*

. . . . Reading the Webb-Kenyon Law in the light thus thrown upon it by the Wilson Act and the decisions of this court which sustained and applied it, there is no room for doubt that it was enacted simply to extend that which was done by the Wilson Act, that is to say, its purpose was to prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in States contrary to their laws. . . .

4. *Did Congress have power to enact the Webb-Kenyon Law?*

The power conferred is to regulate, and the very terms of the grant would seem to repel the contention that only prohibition of movement in interstate commerce was embraced. . . .

. . . . Although *Leisy v. Hardin* [135 U.S. 100] declared in express terms that the movement of intoxicants in interstate commerce belonged to that class which was free from all interference by state control in the absence of regulation by Congress, it was at the same time in the most explicit terms declared that the power of Congress to regulate interstate commerce in intoxicants embraced the right to subject such movement to state prohibitions and that the freedom of intoxicants to move in interstate commerce and the protection over it from state control arose only from the absence of congressional regulation and would endure only until Congress had otherwise provided. Thus in that case in pointing out that the movement of intoxicants in interstate commerce was under the control of Congress despite the wide scope of the police authority of the State over the subject, it was said (p. 108): "Yet a subject-matter which has been confided exclusively to Congress by the Constitution is not within the jurisdiction of the police power of the State, unless placed there by Congressional action." Again, referring to the uniform operation of interstate commerce regulations it was said

(p. 109): "Hence, inasmuch as interstate commerce, consisting in the transportation, purchase, sale and exchange of commodities, is national in its character, and must be governed by a uniform system, so long as Congress does not pass any law to regulate it, or allowing the States so to do, it thereby indicates its will that such commerce shall be free and untrammelled." Further the court said (p. 119): "The conclusion follows that, as the grant of power to regulate commerce among the States, so far as one system is required, is exclusive, the States cannot exercise that power without the assent of Congress," Again after pointing out that the question of the prohibition of manufacture and sale of particular articles was a matter of state concern, it was said (pp. 123, 124): "But notwithstanding it is not vested with supervisory power over matters of local administration, the responsibility is upon Congress, so far as the regulation of interstate commerce is concerned, to remove the restriction upon the State in dealing with imported articles of trade within its limits, which have not been mingled with the common mass of property therein, if in its judgment the end to be secured justifies and requires such action."

. . . . As the power to regulate which was manifested in the Wilson Act and that which was exerted in enacting the Webb-Kenyon Law are essentially identical, the one being but a larger degree of exertion of the identical power which was brought to play in the other, we are unable to understand upon what principle we could hold that the one was not a regulation without holding that the other had the same infirmity, a result which, as we have previously said, would reverse *Leisy v. Hardin* and overthrow the many adjudications of this court sustaining the Wilson Act.

These considerations dispose of the contention, but we do not stop with stating them but recur again to the reason of things for the purpose of pointing out the fundamental error upon which the contention rests. It is this: The mistaken assumption that the accidental considerations which cause a subject on the one hand to come under state control in the absence of congressional regulation, and other subjects on the contrary to be free from state control until Congress has acted, are the essential criteria by which to test the question of the power of Congress to regulate and the mode in which the exertion of that power may be manifested. The two things are widely different, since the right to regulate and its scope and the mode of exertion must depend upon the power possessed by Congress over the subject regulated. Following the unerring path pointed out by that great principle we can see no reason for saying that although Congress in view of the nature and character of intoxicants had a power to forbid their movement in interstate commerce, it had not the authority to so deal with the subject as to establish a

regulation (which is what was done by the Webb-Kenyon Law) making it impossible for one State to violate the prohibitions of the laws of another through the channels of interstate commerce. . . . And it is well again to point out that this abnormal result concerns a subject as to which both State and Nation in their respective spheres of authority possessed the supremest authority before the action of Congress which is complained of, and hence the argument virtually comes to the assertion that in some undisclosed way by the exertion of congressional authority, power possessed has evaporated. . . .

MR. JUSTICE McREYNOLDS concurs in the result.

MR. JUSTICE HOLMES and MR. JUSTICE VAN DEVANTER dissent.

KENTUCKY WHIP & COLLAR CO. *v.* ILLINOIS CENTRAL RAILROAD COMPANY.

Supreme Court of the United States. 1937.
299 U.S. 334.

MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court.

This controversy relates to the constitutional validity of the Act of Congress of July 24, 1935, known as the Ashurst-Sumners Act. 49 Stat. 494.

The Act makes it unlawful knowingly to transport in interstate or foreign commerce goods made by convict labor into any State where the goods are intended to be received, possessed, sold, or used in violation of its laws. Goods made by convicts on parole or probation, or made in federal penal and correctional institutions for use by the Federal Government, are excepted. Packages containing convict-made goods must be plainly labeled so as to show the names and addresses of shipper and consignee, the nature of the contents, and the name and location of the penal or reformatory institution where produced. Violation is punished by fine and forfeiture.

Petitioner manufactures in Kentucky, with convict labor, horse collars, harness and strap goods which it markets in various States. It tendered to respondent, a common carrier, twenty-five separate shipments for transportation in interstate commerce, of which ten were consigned to customers in States whose laws prohibited the sale of convict-made goods within their respective borders, five to States whose laws did not prohibit such sale but required that the goods should be plainly marked so as to show that they were made by convicts, and the remaining ten to States whose laws imposed no restriction upon sale or posses-

sion. None of the packages were labeled as required by the Act of Congress and, in obedience to the Act, respondent refused to accept the shipments.

Petitioner then brought this suit for a mandatory injunction to compel the transportation. . . . The District Court declared the Act to be invalid so far as it prohibited transportation of convict-made goods into States which proscribed sale or possession, but sustained the provision which required labeling. . . . The Circuit Court of Appeals sustained the Act in its entirety. . . . This Court granted certiorari.

Petitioner contends (1) that the Congress is without constitutional authority to prohibit the movement in interstate commerce of useful and harmless articles made by convict labor and (2) that the Congress has no power to exclude from interstate commerce convict-made goods which are not labeled as such.

First. The commerce clause (Art. I, # 8, par. 3) confers upon the Congress "the power to regulate, that is, to prescribe the rule by which commerce is to be governed." This power "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." *Gibbons v. Ogden*, 9 Wheat. 1, 196. By the Act now before us, the Congress purports to establish a rule governing interstate transportation, which is unquestionably interstate commerce. The question is whether this rule goes beyond the authority to "regulate."

Petitioner's argument necessarily recognizes that in certain circumstances an absolute prohibition of interstate transportation is constitutional regulation. The power to prohibit interstate transportation has been upheld by this Court in relation to diseased livestock, lottery tickets, commodities owned by the interstate carrier transporting them, except such as may be required in the conduct of its business as a common carrier, adulterated and misbranded articles, under the Pure Food and Drugs Act, women, for immoral purposes, intoxicating liquors, diseased plants, stolen motor vehicles, and kidnaped persons.

The decisions sustaining this variety of statutes disclose the principles deemed to be applicable. We have frequently said that in the exercise of its control over interstate commerce, the means employed by the Congress may have the quality of police regulations. . . . The power was defined in broad terms in *Brooks v. United States*, 267 U.S. 432, 436, 437: "Congress can certainly regulate interstate commerce to the extent of forbidding and punishing the use of such commerce as an agency to promote immorality, dishonesty, or the spread of any evil or harm to the people of other States from the State of origin. In doing this it is merely exercising the police power, for the benefit of the public, within the field of interstate commerce."

The anticipated evil or harm may proceed from something inherent in the subject of transportation as in the case of diseased or noxious articles, which are unfit for commerce. *Hipolite Egg Co. v. United States*, 220 U.S. 45. . . . Or the evil may lie in the purpose of the transportation, as in the case of lottery tickets, or the transportation of women for immoral purposes. *Champion v. Ames*, 188 U.S. 321, 358; *Hoke v. United States*, [227 U.S. 328]. . . . The prohibition may be designed to give effect to the policies of the Congress in relation to the instrumentalities of interstate commerce. . . . *United States v. Delaware & Hudson Co.*, 213 U.S. 366, 415. And, while the power to regulate interstate commerce resides in the Congress, which must determine its own policy, the Congress may shape that policy in the light of the fact that the transportation in interstate commerce, if permitted, would aid in the frustration of valid state laws for the protection of persons and property. *Brooks v. United States*, *supra*; *Gooch v. United States*, 297 U.S. 124.

The contention is inadmissible that the Act of Congress is invalid merely because the horse collars and harness which petitioner manufactures and sells are useful and harmless articles. . . .

On the same general principle, the Congress may prevent interstate transportation from being used to bring into a State articles the traffic in which the State has constitutional authority to forbid, and has forbidden, in its internal commerce. In that view, we sustained the acts of Congress designed to prevent the use of interstate transportation to hamper the execution of state policy with respect to traffic in intoxicating liquors. This was not because intoxicating liquors were not otherwise legitimate articles of commerce. . . . It was because intoxicating liquors were legitimate subjects of commercial intercourse that the States were powerless to interfere with their transportation in interstate commerce. . . . But because of the effects ascribed to the traffic in intoxicating liquors, the States in the exercise of their police power in relation to their internal commerce could restrict or interdict that traffic without violating the Federal Constitution. . . . To aid the States in securing the full protection they desired, Congress brought into play its power to regulate interstate commerce.

By the Wilson Act of August 8, 1890, intoxicating liquors transported into any State were subjected upon arrival to the operation of state laws to the same extent as though they had been produced within the State, although still in the original packages. This act was upheld in *In re Rabrer*, [140 U.S. 545]. . . . In this situation the Congress passed the Webb-Kenyon Act of March 1, 1913, which prohibited the transportation of intoxicating liquors into any State when it was intended that they should be "received, possessed, sold, or in any manner used," in violation

of its laws. The Court upheld the constitutional validity of this Act as a regulation of interstate commerce. *Clark Distilling Co. v. Western Maryland Ry. Co.*, [242 U.S. 311]. It was supplemented by the Act of March 3, 1917, known as the Reed Amendment. *United States v. Hill*, 248 U.S. 420, 424. . . .

The course of congressional legislation with respect to convict-made goods has followed closely the precedents as to intoxicating liquors. By the Hawes-Cooper Act of January 19, 1929, the Congress provided that convict-made goods (with certain exceptions) transported into any State should be subject upon arrival, whether in the original packages or otherwise, to the operation of state laws as if produced within the State. . . . As to the validity of the latter Act, the Court followed the decision in *In re Rabrer, supra*, in relation to the Wilson Act. (*Whitfield v. Ohio*, 297 U.S. 431.)

The Ashurst-Sumners Act as to interstate transportation of convict-made goods has substantially the same provisions as the Webb-Kenyon Act as to intoxicating liquors and finds support in similar considerations. The subject of the prohibited traffic is different, the effects of the traffic are different, but the underlying principle is the same. The pertinent point is that where the subject of commerce is one as to which the power of the State may constitutionally be exerted by restriction or prohibition in order to prevent harmful consequences, the Congress may, if it sees fit, put forth its power to regulate interstate commerce so as to prevent that commerce from being used to impede the carrying out of the state policy.

In the congressional action there is nothing arbitrary or capricious bringing the statute into collision with the requirements of due process of law. . . . Nor has the Congress attempted to delegate its authority to the States. The Congress has not sought to exercise a power not granted or to usurp the police powers of the States. It has not acted on any assumption of a power enlarged by virtue of state action. . . .

Second. . . . The requirement of labels, disclosing the nature of the contents, the name and location of the penal institution where the goods were produced, and the names and addresses of shippers and consignees, was manifestly reasonable and appropriate for the carrying out of the prohibition. . . . The fact that the labeling was required in all shipments of convict-made goods, regardless of the law of the State of destination, does not invalidate the provision, as its scope could reasonably be deemed to be necessary to accomplish the legitimate purpose of the Act. . . .

MR. JUSTICE STONE took no part in the consideration or decision of this case.

SEVEN CASES OF ECKMAN'S ALTERNATIVE *v.* UNITED STATES.

Supreme Court of the United States. 1916.
239 U.S. 510.

MR. JUSTICE HUGHES delivered the opinion of the court.

Libels were filed by the United States, in December, 1912, to condemn certain articles of drugs (known as 'Eckman's Alternative') as misbranded in violation of section 8 of the Food & Drugs Act. The articles had been shipped in interstate commerce, from Chicago to Omaha, and remained in the latter place unsold and in the unbroken original packages. . . .

Section 8 of the Food & Drugs Act, as amended by the act of August 23, 1912, c. 352, 37 Stat. 416, provides, with respect to the misbranding of drugs, as follows:

* * * * *

"Third. If its package or label shall bear or contain any statement, design, or device regarding the curative or therapeutic effect of such article or any of the ingredients or substances contained therein, which is false and fraudulent" [the article shall be deemed misbranded].

The amendment of 1912 consisted in the addition of paragraph "Third," which is the provision here involved. . . .

And in every package, containing one of the bottles, there was contained a circular with this statement:

"Effective as a preventative for Pneumonia." "We know it has cured and that it has and will cure Tuberculosis."

The libel charges that the statement "effective as a preventative for pneumonia" is "false, fraudulent and misleading in this, to-wit, that it conveys the impression to purchasers that said article of drugs can be used as an effective preventative for pneumonia, whereas, in truth and in fact said article of drugs could not be so used"; and that the statement, "we know it has cured" and that it "will cure tuberculosis" is false, fraudulent. . . . [etc.]

The principal question presented on this writ of error is with respect to the validity of the amendment of 1912.

So far as it is objected that this measure, though relating to articles transported in interstate commerce, is an encroachment upon the reserved powers of the States, the objection is not to be distinguished in substance from that which was overruled in sustaining the White Slave Act, c. 395, June 25, 1910, 36 Stat. 826. *Hoke v. United States*, 227 U.S. 308. There, after stating that 'if the facility of interstate transportation' can be denied in the case of lotteries, obscene literature, diseased cattle and persons,

and impure food and drugs, the like facility could be taken away from 'the systematic enticement of and the enslavement in prostitution and debauchery of women,' the court concluded with the reassertion of the simple principle that Congress is not to be denied the exercise of its constitutional authority over interstate commerce, and its power to adopt not only means necessary but convenient to its exercise, because these means may have the quality of police regulations. . . .

It is urged that the amendment of 1912 does not embrace circulars contained in the package, but only applies to those statements which appear on the package or on the bottles themselves. . . .

But it appears from the legislative history of the act that the word 'contain' was inserted in the amendment to hit precisely the case of circulars or printed matter placed inside the package. . . .

Referring to the nature of the statements which are within the purview of the amendment, it is said that a distinction should be taken between articles that are illicit, immoral or harmful and those which are legitimate, and that the amendment goes beyond statements dealing with identity or ingredients. But the question remains as to what may be regarded as 'illicit' and we find no ground for saying that Congress may not condemn the interstate transportation of swindling preparations designed to cheat credulous sufferers and make such preparations, accompanied by false and fraudulent statements, illicit with respect to interstate commerce, as well as, for example, lottery tickets. . . .

Finally, the statute is attacked upon the ground that it enters the domain of speculation. . . . We think that this objection proceeds upon a misconstruction of the provision. . . . It is said that the owner has the right to give his views regarding the effect of his drugs. But state of mind is itself a fact, and false and fraudulent representations may be made about it. . . . Congress recognized that there was a wide field in which assertions as to curative effect are in no sense honest expressions of opinion but constitute absolute falsehoods. . . . The amendment of 1912 applies to this field and we have no doubt of its validity. . . .

MR. JUSTICE McREYNOLDS took no part in the consideration or decision of these cases.

DAYTON-GOOSE CREEK RY. CO. v. UNITED STATES.

Supreme Court of the United States. 1924.
263 U.S. 456.

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.

The main question in this case is whether the so-called "recapture" paragraphs of the Transportation Act of 1920, c. 91, # 433, ## 15a, paragraphs 5-17, 41 Stat. 456, 489-491, are constitutional.

The Dayton-Goose Creek Railway Company is a corporation of Texas, engaged in intrastate, interstate and foreign commerce. Its volume of intrastate traffic exceeds that of its interstate and foreign traffic. In response to orders of the Interstate Commerce Commission, the carrier made returns for ten months of 1920, and for the full year of 1921, reporting the value of its railroad property employed in commerce and its net revenue therefrom. It earned \$21,666.24 more than six per cent. on the value of its property in the ten months of 1920, and \$33,766.99 excess in the twelve months of 1921. The Commission requested it to report what provision it had made for setting up a fund to preserve one-half of these excesses, and to remit the other half to the Commission. The carrier then filed the present bill, setting forth the constitutional invalidity of the recapture provisions. . . .

This Court has recently had occasion to construe the Transportation Act. In *Wisconsin R. R. Commission v. C. B. & Q. R. R. Co.*, 257 U.S. 563, it was held that the act in seeking to render the interstate commerce railway system adequate to the country's needs had . . . conferred on the Commission valid power and duty to raise the level of intrastate rates when it found that they were so low as to discriminate against interstate commerce and unduly to burden it. In the *New England Divisions Case*, 261 U.S. 184, it was held that . . . the Commission in making division of joint rates between groups of carriers might in the public interest consult the needs of a weaker group in order to maintain it in effective operation as part of an adequate transportation system, and give it a greater share of such rates if the share of the other group was adequate to avoid a confiscatory result.

In both cases it was pointed out that the Transportation Act adds a new and important object to previous interstate commerce legislation, which was designed primarily to prevent unreasonable or discriminatory rates against persons and localities. The new act seeks affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country. It aims to give the owners of the railways

an opportunity to earn enough to maintain their properties and equipment in such a state of efficiency that they can carry well this burden. To achieve this great purpose, it puts the railroad systems of the country more completely than ever under the fostering guardianship and control of the Commission, which is to supervise their issue of securities, their car supply and distribution, their joint use of terminals, their construction of new lines, their abandonment of old lines, and by a proper division of joint rates, and by fixing adequate rates for interstate commerce, to secure a fair return upon the properties of the carriers engaged.

It was insisted in the two cases referred to, and it is insisted here, that the power to regulate interstate commerce is limited to the fixing of reasonable rates and the prevention of those which are discriminatory, and that when these objects are attained, the power of regulation is exhausted. This is too narrow a view of the commerce clause. To regulate in the sense intended is to foster, protect and control the commerce with appropriate regard to the welfare of those who are immediately concerned, as well as the public at large, and to promote its growth and insure its safety. *The Daniel Ball*, 10 Wall. 557, 564; *California v. Pacific R. R. Co.*, 127 U.S. 1, 39; *Second Employers' Liability Cases*, 223 U.S. 1, 47;

If Congress may build railroads under the commerce clause, it may certainly exert affirmative control over privately owned railroads, to see that such railroads are equipped to perform, and do perform, the requisite public service. . . .

Having regard to the property rights of the carriers and the interest of the shipping public, the validity of the plan depends on two propositions.

First. Rates which as a body enable all the railroads necessary to do the business of a rate territory or section, to enjoy not more than a fair net operating income on the aggregate value of their properties therein economically and efficiently operated, are reasonable from the standpoint of the individual shipper in that section. He with every other shipper similarly situated in the same section is vitally interested in having a system which can do all the business offered. If there is congestion, he suffers with the rest. He may, therefore, properly be required in the rates he pays to share with all other shippers of the same section the burden of maintaining an adequate railway capacity to do their business. . . .

It should be noted that, in reaching a conclusion, upon the first proposition, we are only considering the general level of rates and their direct bearing upon the net return of the entire group. . . .

Second. The carrier owning and operating a railroad, however strong financially, however economical in its facilities, or favorably situated as

to traffic, is not entitled as of constitutional right to more than a fair net operating income upon the value of its properties which are being devoted to transportation. . . . If it receives a fair return on its property, why should it make any difference that other and competing railroads in the same section are permitted to receive higher rates for a service which it costs them more to render and from which they receive no better net return?

The reduction of the net operating return provided by the recapture clause is, as near as may be, the same thing as if rates had all been reduced proportionately before collection. It is clearly unsound to say that the net operating profit accruing from a whole rate structure is not relevant evidence in determining whether the sum of the rates is fair. The investment is made on the faith of a profit, the profit accrues from the balance left after deducting expenses from the product of the rates, and the assumption is that the operation is economical and the expenditures are reasonably necessary. If the profit is fair, the sum of the rates is so. If the profit is excessive, the sum of the rates is so. One obvious way to make the sum of the rates reasonable so far as the carrier is concerned is to reduce its profit to what is fair.

. . . . The statute declares the carrier to be only a trustee for the excess over a fair return received by it. Though in its possession, the excess never becomes its property and it accepts custody of the product of all the rates with this understanding. It is clear, therefore, that the carrier never has such a title to the excess as to render the recapture of it by the Government a taking without due process of law.

. . . . The rates are reasonable from the standpoint of the shipper as we have shown, though their net product furnished more than a fair return to the carrier. The excess caused by the discrepancy between the standard of reasonableness for the shipper and that for the carrier due to the necessity of maintaining uniform rates to be charged the shippers, may properly be appropriated by the Government for public uses because the appropriation takes away nothing which equitably belongs either to the shipper or to the carrier. Yet it is made up of payments for service to the public in transportation, and so it is properly to be devoted to creating a fund for helping the weaker roads more effectively to discharge their public duties. Indirectly and ultimately this should benefit the shippers by bringing the weaker roads nearer in point of economy and efficiency to the stronger roads and thus making it just and possible to reduce the uniform rates.

The third question for our consideration is whether the recapture clause, by reducing the net income from intrastate rates, invades the reserved power of the States and is in conflict with the Tenth Amendment. In solving the problem of maintaining the efficiency of an inter-

state commerce railway system which serves both the States and the Nation, Congress is dealing with a unit in which state and interstate operations are often inextricably commingled. When the adequate maintenance of interstate commerce involves and makes necessary on this account the incidental and partial control of intrastate commerce, the power of Congress to exercise such control has been clearly established. *Minnesota Rate Cases*, 230 U.S. 352, 432, 433; *The Shreveport Case*, 234 U.S. 342, 351; The combination of uniform rates with the recapture clauses is necessary to the better development of the country's interstate transportation system as Congress has planned it. The control of the excess profit due to the level of the whole body of rates is the heart of the plan. To divide that excess and attempt to distribute one part to interstate traffic and the other to intrastate traffic would be impracticable and defeat the plan. This renders indispensable the incidental control by Congress of that part of the excess possibly due to intrastate rates which if present is indistinguishable. . . .

CURRIN *v.* WALLACE.

Supreme Court of the United States. 1939.
306 U.S. 1.

MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court.

Plaintiffs, tobacco warehousemen and auctioneers in Oxford, North Carolina, seek a declaratory judgment that the Tobacco Inspection Act of August 23, 1935, is unconstitutional and an injunction against its enforcement. . . .

The Act applies to transactions involving the sale of tobacco at auction as commonly conducted at auction markets. . . .

The Secretary of Agriculture is authorized to investigate the handling, inspection and marketing of tobacco and to establish standards by which its type, grade, size, condition, or other characteristics may be determined and these standards are to be the official standards of the United States. . . .

The Secretary is authorized to designate those markets where tobacco bought and sold at auction or the products customarily manufactured therefrom move in commerce. He is not to designate a market unless two-thirds of the growers, voting at a prescribed referendum, favor it. . . .

Warehousemen must provide space of warehouse tickets or other tags or labels used by them for showing the grades as determined by an

authorized inspector. . . . Violation of the requirement of inspection and certification at designated markets, is made a misdemeanor punishable by a fine of not more than \$1000 or imprisonment for not more than one year or both.

The market practices which led to this enactment are disclosed by the record. . . . The growers sort their tobacco for market as best they can. . . . The warehousemen auction the tobacco, acting as representatives of the growers and receiving fees at rates fixed by the state law. The auction goes forward with extreme rapidity—about one basket every ten seconds—the auctioneer proceeding along one side of a row and the buyers moving with him. The auction is conducted with a technical vocabulary intelligible only to the initiated, bids being made by well-understood gestures. The sale is not completed until the grower accepts the bid; he may decline the bid and take his tobacco away. The bidders are representatives of tobacco companies and speculators who are experts in grades. The Committee reported that “the possession of grade and price information by the buyers, and the lack of it on the part of the growers, places the growers under a severe handicap in the marketing of their tobacco and opens the way to abuses and practices by which farmers are victimized. . . . It also appears from the record that because of the speed of the sale few buyers have the opportunity to make a satisfactory examination of the tobacco and consequently many errors are made, although on the average the buyers are not supposed to suffer seriously. . . .

Under the operation of the Act federal inspectors examine the tobacco about an hour before the sale. They pull samples from each pile and place tickets indicating the grade. Each day there is displayed in the warehouse a report indicating the average price for the government grades sold on the previous day, and weekly reports are issued for the preceding week. . . .

Plaintiffs contend (1) that the transaction of offering tobacco for sale at auction on the warehouse floor is not a transaction in interstate commerce and hence is not subject to congressional regulation; . . . (3) that the Act provides for an unconstitutional delegation of legislative power. . . .

First. Plaintiffs urge that tobacco “is not inherently an interstate commodity”; that the auction transaction is not a sale as title is not passed until the grower accepts the price; . . . that the inspection required by the Act is done prior to the offering for sale; and that until sale and delivery to the purchaser the tobacco is not in interstate commerce. . . . These objections are untenable. The record shows that the sales consummated on the Oxford auction market are predominantly sales in interstate and foreign commerce. The principal purchasers are few in number

and in the main are engaged in the export trade or in the manufacture of tobacco products in other States. It appears that in a given week, shortly before the beginning of this suit, approximately 2,000,000 pounds of tobacco were sold on the Oxford market, only 15.3 per cent. of which was definitely destined for manufacture in North Carolina. About 14 per cent. were in part for manufacture in North Carolina and in part for other States, and about 62 per cent. moved directly into foreign commerce. The fact that the growers are not bound to accept bids, and in certain instances reject them, does not remove the auction from its immediate relation to the sales that are consummated upon the offers that the growers do accept. The auction in such cases is manifestly a part of the transaction of sale. . . . Where goods are purchased in one State for transportation to another the commerce includes the purchase quite as much as it does the transportation. *Swift & Co. v. United States*, 196 U.S. 375, 398, 399; *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282, 290, 291; *Lemke v. Farmers Grain Co.*, 258 U.S. 50, 54; *Stafford v. Wallace*, 258 U.S. 495, 519. . . .

There is no permissible constitutional theory which would apply this principle to purchases of livestock as in the *Swift* and *Stafford* cases, and of grain as in the *Lemke* . . . case, and deny its application to tobacco. . . .

The fact that intrastate and interstate transactions are commingled on the tobacco market does not frustrate or restrict the congressional power to protect and control what is committed to its own care. As we said in the *Shreveport* case, 234 U.S. 342, 351, 352, with respect to the intrastate rates of interstate carriers—"Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the State, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority and the State, and not the Nation, would be supreme within the national field."

Having this authority to regulate the sales on the tobacco market, Congress could prescribe the conditions under which the sales should be made in order to give protection to sellers or purchasers or both. Congress is not to be denied the exercise of its constitutional authority in prescribing regulations merely because these may have the quality of police regulations. It is on that principle that misbranding under the Food and Drugs Act embraces false or misleading statements as to the ingredients of commodities or the effects of their use. See *Seven Cases v. United States*, 239 U.S. 510. . . . The fact that the inspection and grading of the tobacco take place before the auction does not dissociate the former from the latter, but on the contrary it is obvious that the

inspection and grading have immediate relation to the sales in interstate and foreign commerce which Congress thus undertakes to govern. . . .

Third. The argument that there is an unconstitutional delegation of legislative power is equally untenable. This is not a case where Congress has attempted to abdicate, or to transfer to others, the essential legislative functions with which it is vested by the Constitution. . . . See *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421; *Schechter Corporation v. United States*, 295 U.S. 495, 529, 541, 542, 553. We have always recognized that legislation must often be adapted to conditions involving details with which it is impracticable for the legislature to deal directly. . . . We think that the Tobacco Inspection Act belongs to that class.

So far as growers of tobacco are concerned, the required referendum does not involve any delegation of legislative authority. Congress has merely placed a restriction upon its own regulation by withholding its operation as to a given market "unless two-thirds of the growers voting favor it." . . .

Nor is there an unconstitutional delegation to the Secretary of Agriculture. Congress has set forth its policy for the establishment of standards for tobacco according to type, grade, size, condition, and other determinable characteristics. The provision that the Secretary shall make the necessary investigations to that end and fix the standards according to kind and quality is plainly appropriate and conforms to familiar legislative practice. . . .

Nor does it appear that, in his use of his authority in the instant case, the Secretary has acted in an arbitrary and capricious manner. . . .

MR. JUSTICE McREYNOLDS and MR. JUSTICE BUTLER dissent.

Under the Taxing Power

UNITED STATES *v.* DOREMUS.

Supreme Court of the United States. 1919.
249 U.S. 86.

[The Harrison Narcotic Drug Act of December 17, 1914, requires all persons dispensing in any manner opium or coca leaves or their compounds to register with the Collector of Internal Revenue of their district and to pay a special tax of \$1.00 a year. Section 2 of the act makes it unlawful for any such person to sell or to dispose of in any other way any of these drugs except by an order written on a form, issued in blank, provided by the Commissioner of Internal Revenue. Doremus, a

physician registered according to the provisions of the Narcotic Drug Act, who had paid the required tax, both sold and gave 500 one-sixth grain heroin tablets to a man named Ameris without requiring the written order prescribed by the law. Ameris was an addict, and was known to Doremus as a "dope fiend." Doremus was indicted for a violation of section 2 of the act.]

MR. JUSTICE DAY delivered the opinion of the Court. . . .

The only limitation upon the power of Congress to levy excise taxes of the character now under consideration is geographical uniformity throughout the United States. This court has often declared it cannot add others. Subject to such limitation Congress may select the subjects of taxation, and may exercise the power conferred at its discretion. *License Tax Cases*, 5 Wall. 462, 471. Of course Congress may not in the exercise of federal power exert authority wholly reserved to the States. Many decisions of this court have so declared. And from an early day the court has held that the fact that other motives may impel the exercise of federal taxing power does not authorize the courts to inquire into that subject. If the legislation enacted has some reasonable relation to the exercise of the taxing authority conferred by the Constitution, it cannot be invalidated because of the supposed motives which induced it. *Veazie Bank v. Fenno*, 8 Wall. 533, 541, in which case this court sustained a tax on a state bank issue of circulating notes. *McCray v. United States*, 195 U.S. 27, where the power was thoroughly considered, and an act levying a special tax upon oleomargarine artificially colored was sustained. . . .

Nor is it sufficient to invalidate the taxing authority given to the Congress by the Constitution that the same business may be regulated by the police power of the State. *License Tax Cases*, 5 Wall., *supra*.

The act may not be declared unconstitutional because its effect may be to accomplish another purpose as well as the raising of revenue. If the legislation is within the taxing authority of Congress—that is sufficient to sustain it. . . .

. . . . Considering the full power of Congress over excise taxation the decisive question here is: Have the provisions in question any relation to the raising of revenue? That Congress might levy an excise tax upon such dealers . . . cannot be successfully disputed. The provisions of § 2, to which we have referred, aim to confine sales to registered dealers and to those dispensing the drugs as physicians, and to those who come to dealers with legitimate prescriptions of physicians. Congress, with full power over the subject, short of arbitrary and unreasonable action which is not to be assumed, inserted these provisions

in an act specifically providing for the raising of revenue. Considered of themselves, we think they tend to keep the traffic aboveboard and subject to inspection by those authorized to collect the revenue. They tend to diminish the opportunity of unauthorized persons to obtain the drugs and sell them clandestinely without paying the tax imposed by the federal law. This case well illustrates the possibility which may have induced Congress to insert the provisions limiting sales to registered dealers and requiring patients to obtain these drugs as a medicine from physicians or upon regular prescriptions. Ameris, being as the indictment charges an addict, may not have used this great number of doses for himself. He might sell some to others without paying the tax, at least Congress may have deemed it wise to prevent such possible dealings because of their effect upon the collection of the revenue.

We cannot agree with the contention that the provisions of # 2, controlling the disposition of these drugs in the ways described, can have nothing to do with facilitating the collection of the revenue, as we should be obliged to do if we were to declare this act beyond the power of Congress acting under its constitutional authority to impose excise taxes. . . .

THE CHIEF JUSTICE dissents because the statute was a mere attempt by Congress to exert a power not delegated, that is, the reserved police power of the States.

MR. JUSTICE McKENNA, MR. JUSTICE VAN DEVANTER and MR. JUSTICE McREYNOLDS concur in this dissent.

MC CRAY *v.* UNITED STATES.

Supreme Court of the United States. 1904.
195 U.S. 27.

The United States sued McCray for a statutory penalty of \$50, alleging that, being a licensed retail dealer in oleomargarine, he had, in violation of the acts of Congress (1886, 24 Stat. 200 and its amendment, 1902, 32 Stat. 93), knowingly purchased for resale a fifty-pound package of oleomargarine, artificially colored to look like butter, to which there were affixed internal revenue stamps at the rate of one-fourth of a cent a pound, upon which the law required stamps at the rate of ten cents per pound. The answer of McCray set up two defences.

First. . . . It was asserted that whilst it was true that the oleomargarine was of a yellow color, that this result was not caused by artificial coloration, but was solely occasioned by the fact that the butter which

was bought in the open market and used in making the oleomargarine had a deep yellow color imparted to it (the butter) by a substance known as Wells-Richardson's improved butter color. . . .

Second. If the act of Congress imposing the tax, when rightfully construed, required stamps at the rate of ten cents per pound upon oleomargarine, colored as described in the first defence, the act levying such tax was charged to be repugnant to the Constitution of the United States. . . .

MR. JUSTICE WHITE, after making the foregoing statement, delivered the opinion of the Court. . . .

Whilst, as a result of our written constitution, it is axiomatic that the judicial department of the government is charged with the solemn duty of enforcing the Constitution, and therefore in cases properly presented, of determining whether a given manifestation of authority has exceeded the power conferred by that instrument, no instance is afforded from the foundation of the government where an act, which was within a power conferred, was declared to be repugnant to the Constitution, because it appeared to the judicial mind that the particular exertion of constitutional power was either unwise or unjust. . . .

It is, however, argued if a lawful power may be exerted for an unlawful purpose, and thus by abusing the power it may be made to accomplish a result not intended by the Constitution, all limitations of power must disappear, and the grave function lodged in the judiciary, to confine all the departments within the authority conferred by the Constitution, will be of no avail. . . . But this reduces itself to the contention that, under our constitutional system, the abuse by one department of the government of its lawful powers is to be corrected by the abuse of its powers by another department. . . .

It is, of course, true, as suggested, that if there be no authority in the judiciary to restrain a lawful exercise of power by another department of the government, where a wrong motive or purpose has impelled to the exertion of the power, that abuses of a power conferred may be temporarily effectual. The remedy for this, however, lies, not in the abuse by the judicial authority of its functions, but in the people, upon whom, after all, under our institutions, reliance must be placed for the correction of abuses committed in the exercise of a lawful power. . . .

The decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted. . . .

It being thus demonstrated that the motive or purpose of Congress in adopting the acts in question may not be inquired into, we are brought to consider the contentions relied upon to show that the acts assailed were beyond the power of Congress, putting entirely out of view all considerations based upon purpose or motive.

1. Undoubtedly, in determining whether a particular act is within a granted power, its scope and effect are to be considered. Applying this rule to the acts assailed, it is self-evident that on their face they levy an excise tax. That being their necessary scope and operation, it follows that the acts are within the grant of power. The argument to the contrary rests on the proposition that, although the tax be within the power, as enforcing it will destroy or restrict the manufacture of artificially colored oleomargarine, therefore the power to levy the tax did not obtain. This, however, is but to say that the question of power depends, not upon the authority conferred by the Constitution, but upon what may be the consequence arising from the exercise of the lawful authority.

Since . . . the taxing power conferred by the Constitution knows no limits except those expressly stated in that instrument, it must follow, if a tax be within the lawful power, the exertion of that power may not be judicially restrained because of the results to arise from its exercise. . . .

2. The proposition that where a tax is imposed which is within the grant of powers, and which does not conflict with any express constitutional limitation, the courts may hold the tax to be void because it is deemed that the tax is too high, is absolutely disposed of by the opinions in the cases. . . .

3. Whilst undoubtedly both the Fifth and Tenth Amendments qualify, in so far as they are applicable, all the provisions of the Constitution, nothing in those amendments operates to take away the grant of power to tax conferred by the Constitution upon Congress. . . .

The right of Congress to tax within its delegated power being unrestrained, except as limited by the Constitution, it was within the authority conferred on Congress to select the objects upon which an excise should be laid. It therefore follows that, in exerting its power, no want of due process of law could possibly result, because that body chose to impose an excise on artificially colored oleomargarine and not upon natural butter artificially colored. The judicial power may not usurp the functions of the legislative in order to control that branch of the government in the performance of its lawful duties. . . .

But it is urged that artificially colored oleomargarine and artificially colored natural butter are in substance and in effect one and the same thing, and from this it is deduced that to lay an excise tax only on

oleomargarine artificially colored and not on butter so colored is violative of the due process clause of the Fifth Amendment, because, as there is no possible distinction between the two, the act of Congress was a mere arbitrary imposition of an excise on the one article and not on the other, although essentially of the same class. . . . The distinction between natural butter artificially colored, and oleomargarine artificially colored so as to cause it to look like butter, has been pointed out in previous adjudications of this Court. . . .

4. Lastly we come to consider the argument that, even though as a general rule a tax of the nature of the one in question would be within the power of Congress, in this case the tax should be held not to be within such power, because of its effect. This is based on the contention that, as the tax is so large as to destroy the business of manufacturing oleomargarine artificially colored to look like butter it thus deprives the manufacturers of that article of their freedom to engage in a lawful pursuit, and hence, irrespective of the distribution of powers made by the Constitution, the taxing laws are void, because they violate those fundamental rights which it is the duty of every free government to safeguard, and which, therefore, should be held to be embraced by implied though none the less potential guaranties, or in any event to be within the protection of the due process clause of the Fifth Amendment.

Let us concede, for the sake of argument only, the premise of fact upon which the proposition is based. . . .

Such concession, however, is not controlling in this case. This follows when the nature of oleomargarine, artificially colored to look like butter, is recalled. As we have said, it has been conclusively settled by this court that the tendency of that article to deceive the public into buying it for butter is such that the States may, in the exertion of their police powers, without violating the due process clause of the Fourteenth Amendment, absolutely prohibit the manufacture of the article. It hence results, that even although it be true, that the effect of the tax in question is to repress the manufacture of artificially colored oleomargarine, it cannot be said that such repression destroys rights which no free government could destroy, and, therefore, no ground exists to sustain the proposition that the judiciary may invoke an implied prohibition, upon the theory that to do so is essential to save such rights from destruction. And the same considerations dispose of the contention based upon the due process clause of the Fifth Amendment. . . .

Let us concede that if a case was presented where the abuse of the taxing power was so extreme as to be beyond the principles which we have previously stated, and where it was plain to the judicial mind that the power had been called into play not for revenue but solely for the

purpose of destroying rights which could not be rightfully destroyed consistently with the principles of freedom and justice upon which the Constitution rests, that it would be the duty of the courts to say that such an arbitrary act was not merely an abuse of a delegated power, but was the exercise of an authority not conferred. This concession, however, like the one previously made, must be without influence upon the decision of this cause for the reasons previously stated; that is, that the manufacture of artificially colored oleomargarine may be prohibited by a free government without a violation of fundamental rights.

THE CHIEF JUSTICE, MR. JUSTICE BROWN and MR. JUSTICE PECKHAM dissent.

CHILD LABOR TAX CASE.

Supreme Court of the United States. 1922.
259 U.S. 20.

[BAILEY v. DREXEL FURNITURE CO.]

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.

This case presents the question of the constitutional validity of the Child Labor Tax Law. The plaintiff below, the Drexel Furniture Company, is engaged in the manufacture of furniture in the Western District of North Carolina. On September 20, 1921, it received a notice from Bailey, United States Collector of Internal Revenue for the District, that it had been assessed \$6,312.79 for having during the taxable year 1919 employed in its factory a boy under fourteen years of age, thus incurring the tax of ten per cent. on its net profits for that year. The Company paid the tax under protest, and after rejection of its claim for a refund, brought this suit. The writ of error is prosecuted by the Collector direct from the District Court under # 238 of the Judicial Code.

The Child Labor Tax Law is Title XII of an act entitled "An Act To provide revenue, and for other purposes," approved February 24, 1919, c. 18, 40 Stat. 1057, 1138. The heading of the title is "Tax on Employment of Child Labor." Section 1200 is as follows:

"Sec. 1200. That every person operating (a) any mine or quarry situated in the United States in which children under the age of sixteen years have been employed during any portion of the taxable year; or (b) any mill, cannery, workshop, factory, or manufacturing establishment situated in the United States in which children

under the age of fourteen years have been employed or children between the ages of fourteen and sixteen have been employed more than eight hours in any day or more than six days in any week, or after the hour of seven o'clock post meridian, or before the hour of six o'clock ante meridian, during any portion of the taxable year, shall pay for each taxable year, in addition to all other taxes imposed by law, an excise tax equivalent to ten percentum of the entire net profits received for such year. . . ."

The law is attacked on the ground that it is a regulation of the employment of child labor in the States—an exclusively state function under the Federal Constitution and within the reservations of the Tenth Amendment. It is defended on the ground that it is a mere excise tax levied by the Congress of the United States under its broad power of taxation conferred by # 8, Article I, of the Federal Constitution. We must construe the law and interpret the intent and meaning of Congress from the language of the act. The words are to be given their ordinary meaning unless the context shows that they are differently used. Does this law impose a tax with only that incidental restraint and regulation which a tax must inevitably involve? Or does it regulate by the use of the so-called tax as a penalty? If a tax, it is clearly an excise. If it were an excise on a commodity or other thing of value we might not be permitted under previous decisions of this court to infer solely from its heavy burden that the act intends a prohibition instead of a tax. But this act is more. It provides a heavy exaction for a departure from a detailed and specified course of conduct in business. In the light of these features of the act, a court must be blind not to see that the so-called tax is imposed to stop the employment of children within the age limits prescribed. Its prohibitory and regulatory effect and purpose are palpable. All others can see and understand this. How can we properly shut our minds to it?

It is the high duty and function of this court in cases regularly brought to its bar to decline to recognize or enforce seeming laws of Congress, dealing with subjects not entrusted to Congress but left or committed by the supreme law of the land to the control of the States. We can not avoid the duty even though it require us to refuse to give effect to legislation designed to promote the highest good. The good sought in unconstitutional legislation is an insidious feature because it leads citizens and legislators of good purpose to promote it without thought of the serious breach it will make in the ark of our covenant or the harm which will come from breaking down recognized standards. In the maintenance of local self government, on the one hand, and the national power, on the other, our country has been able to endure and prosper for near a century and a half.

Out of a proper respect for the acts of a coördinate branch of the Government, this court has gone far to sustain taxing acts as such, even though there has been ground for suspecting from the weight of the tax it was intended to destroy the subject. But, in the act before us, the presumption of validity cannot prevail, because the proof of the contrary is found on the very face of its provisions. Grant the validity of the law, and all that Congress would need to do, hereafter, in seeking to take over to its control any one of the great number of subjects of public interest, jurisdiction of which the States have never parted with, and which are reserved to them by the Tenth Amendment, would be to enact a detailed measure of complete regulation of the subject and enforce it by a so-called tax upon departures from it. To give such magic to the word "tax" would be to break down all constitutional limitation of the powers of Congress and completely wipe out the sovereignty of the States.

The difference between a tax and a penalty is sometimes difficult to define and yet the consequences of the distinction in the required method of their collection often are important. Where the sovereign enacting the law has power to impose both tax and penalty the difference between revenue production and mere regulation may be immaterial, but not so when one sovereign can impose a tax only, and the power of regulation rests in another. Taxes are occasionally imposed in the discretion of the legislature on proper subjects with the primary motive of obtaining revenue from them and with the incidental motive of discouraging them by making their continuance onerous. They do not lose their character as taxes because of the incidental motive. But there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment. Such is the case in the law before us. . . .

The case before us can not be distinguished from that of *Hammer v. Dagenhart*, 247 U.S. 251. . . .

The analogy of the *Dagenhart Case* is clear. The congressional power over interstate commerce is, within its proper scope, just as complete and unlimited as the congressional power to tax, and the legislative motive in its exercise is just as free from judicial suspicion and inquiry. Yet when Congress threatened to stop interstate commerce in ordinary and necessary commodities, unobjectionable as subjects of transportation and to deny the same to the people of a State in order to coerce them into compliance with Congress's regulation of state concerns, the court said this was not in fact regulation of interstate commerce, but rather that of State concerns and was invalid. So here the so-called tax is a penalty to coerce people of a State to act as Congress wishes them to

act in respect of a matter completely the business of the state government under the Federal Constitution. . . .

But it is pressed upon us that this court has gone so far in sustaining taxing measures the effect or tendency of which was to accomplish purposes not directly within congressional power that we are bound by authority to maintain this law.

The first of these is *Veazie Bank v. Fenno*, 8 Wall. 533. . . .

The next case is that of *McCray v. United States*, 195 U.S. 27. . . . It was a tax on oleomargarine, a substitute for butter. The tax on the white oleomargarine was one-quarter of a cent a pound, and on the yellow oleomargarine was first two cents and was then by the act in question increased to ten cents per pound. This court held that the discretion of Congress in the exercise of its constitutional powers to levy excise taxes could not be controlled or limited by the courts because the latter might deem the incidence of the tax oppressive or even destructive. . . . In neither of these cases did the law objected to show on its face as does the law before us the detailed specifications of a regulation of a state concern and business with a heavy exaction to promote the efficacy of such regulation.

The third case is that of *Flint v. Stone Tracy Co.*, 220 U.S. 107. . . .

The fourth case is *United States v. Doremus*, 249 U.S. 86. That involved the validity of the Narcotic Drug Act, 38 Stat. 785, which imposed a special tax on the manufacture, importation and sale or gift of opium or cocoa leaves or their compounds or derivatives. . . . The validity of a special tax in the nature of an excise tax on the manufacture, importation and sale of such drugs was, of course, unquestioned. . . .

The court said that the act could not be declared invalid just because another motive than taxation, not shown on the face of the act, might have contributed to its passage. This case does not militate against the conclusion we have reached in respect of the law now before us. The court, there, made manifest its view that the provisions of the so-called taxing act must be naturally and reasonably adapted to the collection of the tax and not solely to the achievement of some other purpose plainly within state power. . . .

MR. JUSTICE CLARKE dissents.

SONZINSKY *v.* UNITED STATES.Supreme Court of the United States. 1937.
300 U.S. 506.

MR. JUSTICE STONE delivered the opinion of the Court.

The question for decision is whether # 2 of the National Firearms Act of June 26, 1934, . . . which imposes a \$200 annual license tax on dealers in firearms, is a constitutional exercise of the legislative power of Congress. . . .

Section 2 of the National Firearms Act requires every dealer in firearms to register with the Collector of Internal Revenue in the district where he carries on business, and to pay a special excise tax of \$200 a year. Importers or manufacturers are taxed \$500 a year. Section 3 imposes a tax of \$200 on each transfer of a firearm, payable by the transferor, and # 4 prescribes regulations for the identification of purchasers. The term "firearm" is defined by # 1 as meaning a shotgun or a rifle having a barrel less than eighteen inches in length, or any other weapon, except a pistol or revolver, from which a shot is discharged by an explosive, if capable of being concealed on the person, or a machine gun, and includes a muffler or silencer for any firearm. . . . Section 16 declares that the provisions of the Act are separable. Each tax is on a different activity and is collectible independently of the other. . . .

[Sonzinsky was convicted by the District Court for Eastern Illinois of violating # 2 of this Act by dealing in firearms without payment of the tax. The Circuit Court of Appeals affirmed the conviction. Sonzinsky then petitioned for a grant of certiorari.]

In the exercise of its constitutional power to lay taxes, Congress may select the subjects of taxation, choosing some and omitting others. . . . Its power extends to the imposition of excise taxes upon the doing of business. . . . Petitioner does not deny that Congress may tax his business as a dealer in firearms. He insists that the present levy is not a true tax, but a penalty imposed for the purpose of suppressing traffic in a certain noxious type of firearms, the local regulation of which is reserved to the states because not granted to the national government. To establish its penal and prohibitive character, he relies on the amounts of the tax imposed by # 2 on dealers, manufacturers and importers, and of the tax imposed by # 3 on each transfer of a "firearm," payable by the transferor. The cumulative effect on the distribution of a limited class of firearms, of relatively small value, by the successive imposition of

different taxes, one on the business of the importer or manufacturer, another on that of the dealer, and a third on the transfer to a buyer, is said to be prohibitive in effect and to disclose unmistakably the legislative purpose to regulate rather than to tax.

The case is not one where the statute contains regulatory provisions related to a purported tax in such a way as has enabled this Court to say in other cases that the latter is a penalty resorted to as a means of enforcing the regulations. See *Child Labor Tax Case*, 259 U.S. 20, 35; *Hill v. Wallace*, 259 U.S. 44; *Carter v. Carter Coal Co.*, 298 U.S. 238. Nor is the subject of the tax described or treated as criminal by the taxing statute. . . . Here # 2 contains no regulation other than the mere registration provisions, which are obviously supportable as in aid of a revenue purpose. On its face it is only a taxing measure, and we are asked to say that the tax, by virtue of its deterrent effect on the activities taxed, operates as a regulation which is beyond the congressional power.

Every tax is in some measure regulatory. To some extent it interposes an economic impediment to the activity taxed as compared with others not taxed. But a tax is not any the less a tax because it has a regulatory effect, *United States v. Doremus*, (249 U.S. 86,) 93, 94; *License Tax Cases*, 5 Wall. 462. . . . ; and it has long been established that an Act of Congress which on its face purports to be an exercise of the taxing power is not any the less so because the tax is burdensome or tends to restrict or suppress the thing taxed. . . . *McCray v. United States*, 195 U.S. 27, 60-61. . . .

Inquiry into the hidden motives which may move Congress to exercise a power constitutionally conferred upon it is beyond the competency of courts. . . . *Fletcher v. Peck*, 6 Cranch, 87, 130. They will not undertake, by collateral inquiry as to the measure of the regulatory effect of a tax, to ascribe to Congress an attempt, under the guise of taxation, to exercise another power denied by the Federal Constitution. . . .

Here the annual tax of \$200 is productive of some revenue. We are not free to speculate as to the motives which moved Congress to impose it, or as to the extent to which it may operate to restrict the activities taxed. As it is not attended by an offensive regulation, and since it operates as a tax, it is within the national taxing power. . . .

Under the War Powers

YAKUS v. UNITED STATES.

Supreme Court of the United States. 1944.
321 U.S. 414.

Opinion of the Court by MR. CHIEF JUSTICE STONE, announced by MR. JUSTICE ROBERTS.

The questions for our decision are: (1) Whether the Emergency Price Control Act of January 30, 1942, as amended by the Inflation Control Act of October 2, 1942, involves an unconstitutional delegation to the Price Administrator of the legislative power of Congress to control prices; (2) whether sec. 204 (d) of the Act was intended to preclude consideration by a district court of the validity of a maximum price regulation promulgated by the Administrator, as a defense to a criminal prosecution for its violation; (3) whether the exclusive statutory procedure set up by secs. 203 and 204 of the Act for administrative and judicial review of regulations, with the accompanying stay provisions, provide a sufficiently adequate means of determining the validity of a price regulation to meet the demands of due process; and (4) whether, in view of this available method of review, sec. 204 (d) of the Act contravenes the Sixth Amendment, or works an unconstitutional legislative interference with the judicial power.

Petitioners were tried and convicted by the District Court for Massachusetts upon several counts of indictments charging the willful sale of wholesale cuts of beef at prices above the maximum prices prescribed. . . . Petitioners have not availed themselves of the procedure set up by which any person subject to a maximum price regulation may test its validity by protest to and hearing before the Administrator, whose determination may be reviewed on complaint to the Emergency Court of Appeals and by this Court on certiorari, see *Lockerty v. Phillips*, 319 U.S. 182. When the indictments were found the 60 days' period allowed by the statute for filing protests had expired.

In the course of the trial the District Court overruled or denied offers of proof, motions and requests for rulings, raising various questions as to the validity of the Act and Regulation, including those presented by the petitions for certiorari. . . . The District Court convicted petitioners upon verdicts of guilty. The Circuit Court of Appeals affirmed

I.

The Emergency Price Control Act provides for the establishment of the Office of Price Administration under the direction of a Price Administrator appointed by the President, and sets up a comprehensive scheme for the promulgation by the Administrator of regulations or orders fixing such maximum prices of commodities and rents as will effectuate the purposes of the Act and conform to the standards which it prescribes. The Act was adopted as a temporary war-time measure. . . .

By the Act of October 2, 1942, the President is directed to stabilize prices, wages and salaries "so far as practicable" on the basis of the levels which existed on September 15, 1942. . . .

That Congress has constitutional authority to prescribe commodity prices as a war emergency measure, and that the Act was adopted by Congress in the exercise of that power, are not questioned here. . . .

The Act is thus an exercise by Congress of its legislative power. In it Congress has stated the legislative objective, has prescribed the method of achieving that objective—maximum price fixing—and has laid down standards to guide the administrative determination of both the occasions for the exercise of the price-fixing power, and the particular prices to be established. . . .

The Act is unlike the National Industrial Recovery Act of June 16, 1933 considered in *Schechter Corp. v. United States*, 295 U.S. 495, which proclaimed in the broadest terms its purpose "to rehabilitate industry and to conserve natural resources." It prescribed no method of attaining that end save by the establishment of codes of fair competition, the nature of whose permissible provisions was left undefined. It provided no standards to which those codes were to conform. The function of formulating the codes was delegated, not to a public official responsible to Congress or the Executive, but to private individuals engaged in the industries to be regulated. . . .

The Constitution as a continuously operative charter of government does not demand the impossible or the impracticable. It does not require that Congress find for itself every fact upon which it desires to base legislative action or that it make for itself detailed determinations which it has declared to be prerequisite to the application of the legislative policy to particular facts and circumstances impossible for Congress itself properly to investigate. The essentials of the legislative function are the determination of the legislative policy and its formulation and promulgation as a defined and binding rule of conduct—here the rule, with penal sanctions, that prices shall not be greater than those fixed by maximum price regulations which conform to standards and will tend

to further the policy which Congress has established. These essentials are preserved when Congress has specified the basic conditions of fact upon whose existence or occurrence, ascertained from relevant data by a designated administrative agency, it directs that its statutory command shall be effective. It is no objection that the determination of facts and the inferences to be drawn from them in the light of the statutory standards and declaration of policy call for the exercise of judgment, and for the formulation of subsidiary administrative policy within the prescribed statutory framework. See *Opp Cotton Mills v. Administrator*, 312 U.S. 126, 145-6 and cases cited.

Nor does the doctrine of separation of powers deny to Congress power to direct that an administrative officer properly designated for that purpose have ample latitude within which he is to ascertain the conditions which Congress has made prerequisite to the operation of its legislative command. Acting within its constitutional power to fix prices it is for Congress to say whether the data on the basis of which prices are to be fixed are to be confined within a narrow or a broad range. In either case the only concern of courts is to ascertain whether the will of Congress has been obeyed. This depends not upon the breadth of the definition of the facts or conditions which the administrative officer is to find but upon the determination whether the definition sufficiently marks the field within which the Administrator is to act so that it may be known whether he has kept within it in compliance with the legislative will.

As we have said, "The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality to perform its function." *Curran v. Wallace*, 306 U.S. 1, 15. Hence it is irrelevant that Congress might itself have prescribed the maximum prices or have provided a more rigid standard by which they are to be fixed. . . . Congress is not confined to that method of executing its policy which involves the least possible delegation of discretion to administrative officers. Compare *M'Culloch v. Maryland*, 4 Wheat. 316, 413 *et seq.* It is free to avoid the rigidity of such a system, which might well result in serious hardship, and to choose instead the flexibility attainable by the use of less restrictive standards. . . .

The directions that the prices fixed shall be fair and equitable, that in addition they shall tend to promote the purposes of the Act, and that in promulgating them consideration shall be given to prices prevailing in a stated base period, confer no greater reach for administrative determination than the power to fix just and reasonable rates, see *Sunshine Coal Co. v. Adkins*, 310 U.S. 381, and cases cited; or the power to approve consolidations in the "public interest," sustained in *New York Central Securities Corp. v. United States*, 287 U.S. 12, 24-5 ; or the

power to regulate radio stations engaged in chain broadcasting "as public interest, convenience or necessity requires," upheld in *National Broadcasting Co. v. United States*, 319 U.S. 190, 225-6; or the power to prohibit "unfair methods of competition" not defined or forbidden by the common law, *Federal Trade Commission v. Keppel & Bro.*, 291 U.S. 304; or the direction that in allotting marketing quotas among states and producers due consideration be given to a variety of economic factors, sustained in *Mulford v. Smith*, 307 U.S. 38, 48-9; or the similar direction that in adjusting tariffs to meet differences in costs of production the President "take into consideration" "in so far as he finds it practicable" a variety of economic matters, sustained in *Hampton & Co. v. United States*, 276 U.S. 394; or the similar authority, in making classifications within an industry, to consider various named and unnamed "relevant factors" and determine the respective weights attributable to each, held valid in *Opp Cotton Mills v. Administrator*, *supra*.

II.

We consider next the question whether the procedure which Congress has established for determining the validity of the Administrator's regulations is exclusive so as to preclude the defense of invalidity of the Regulation in this criminal prosecution for its violation. . . .

In *Lockerty v. Phillips*, *supra*, we held that [the Act] conferred on the Emergency Court of Appeals, subject to review by this Court, exclusive equity jurisdiction to restrain enforcement of price regulations of the Administrator and that they withdrew such jurisdiction from all other courts. . . .

Congress, in thus authorizing consideration by the district court of the validity of the Act alone, gave clear indication that the validity of the Administrator's regulations or orders should not be subject to attack in criminal prosecutions for their violation, at least before their invalidity had been adjudicated by recourse to the protest procedure prescribed by the statute. . . .

III.

We come to the question whether the provisions of the Act, so construed as to deprive petitioners of opportunity to attack the Regulation in a prosecution for its violation, deprive them of the due process of law guaranteed by the Fifth Amendment. . . .

In considering these asserted hardships, it is appropriate to take into account the purposes of the Act and the circumstances attending its enactment and application as a wartime emergency measure. The Act was adopted January 30, 1942, shortly after our declaration of war

against Germany and Japan, when it was common knowledge that there was grave danger of wartime inflation and the disorganization of our economy from excessive price rises. Congress was under pressing necessity of meeting this danger by a practicable and expeditious means which would operate with such promptness, regularity and consistency as would minimize the sudden development of commodity price disparities, accentuated by commodity shortages occasioned by the war.

Inflation is accelerated and its consequences aggravated by price disparities not based on geographic or other relevant differentials. The harm resulting from delayed or unequal price control is beyond repair. These evils might well arise if regulations were to be made ineffective by injunction or stay of their enforcement in advance of final determination of their validity.

Congress, in enacting the Emergency Price Control Act, was familiar with the consistent history of delay in utility rate cases. It had in mind the dangers to price control as a preventive of inflation if the validity and effectiveness of prescribed maximum prices were to be subject to the exigencies and delays of litigation originating in eighty-five district courts and continued by separate appeals through eleven separate courts of appeals to this Court, to say nothing of litigation conducted in state courts. . . .

Petitioners assert that they have been denied that opportunity because the sixty days' period allowed for filing a protest is insufficient for that purpose; because the procedure before the Administrator is inadequate to ensure due process. . . . A sufficient answer . . . is that petitioners have failed to seek the administrative remedy and the statutory review which were open to them. . . .

The sixty days' period . . . cannot be said to be unreasonably short in view of the urgency and exigencies of wartime price regulation. . . .

In the circumstances of this case we find no denial of due process in the statutory prohibition of a temporary stay or injunction. . . .

The award of an interlocutory injunction by courts of equity has never been regarded as strictly a matter of right, even though irreparable injury may otherwise result to the plaintiff. Compare *Scripps-Howard Radio v. Federal Communications Comm'n*, 316 U.S. 4, 10 and cases cited. . . .

But where an injunction is asked which will adversely affect a public interest for whose impairment . . . an injunction bond cannot compensate, the court may in the public interest withhold relief until a final determination of the rights of the parties, though the postponement may be burdensome to the plaintiff. *Virginian Ry. Co. v. United States*, 272 U.S. 658, 672-3. . . . What the courts could do Congress can do as the guardian of the public interest of the nation in time of war. . . .

IV.

As we have seen, Congress, through its power to define the jurisdiction of inferior federal courts and to create such courts for the exercise of the judicial power, could, subject to other constitutional limitations, create the Emergency Court of Appeals, give to it exclusive equity jurisdiction to determine the validity of price regulations prescribed by the Administrator, and foreclose any further or other consideration of the validity of a regulation as a defense to a prosecution for its violation. . . .

No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it. . . .

The analogy of such a procedure to the present, by which violation of a price regulation is made penal, unless the offender has established its unlawfulness by an independent statutory proceeding, is complete and obvious. . . .

We have no occasion to decide whether one charged with criminal violation of a duly promulgated price regulation may defend on the ground that the regulation is unconstitutional on its face. . . .

In the exercise of the equity jurisdiction of the Emergency Court of Appeals to test the validity of a price regulation, a jury trial is not mandatory under the Seventh Amendment. *Block v. Hirsh*, 256 U.S. 135, 158. Nor has there been any denial in the present criminal proceeding of the right, guaranteed by the Sixth Amendment, to a trial by a jury of the state and district where the crime was committed. . . .

MR. JUSTICE ROBERTS, dissenting. . . .

There are references to the war emergency, and yet the reasoning and the authorities cited seem to indicate that the delegation [of power] would be good in peacetime and in respect of peacetime administration. . . .

But if the court puts its decision on the war power I think it should say so. The citizens of this country will then know that in war the function of legislation may be surrendered to an autocrat whose "judgment" will constitute the law; and that his judgment will be enforced by federal officials pursuant to civil judgments, and criminal punishments will be imposed by courts as matters of routine.

If, on the contrary, such a delegation as is here disclosed is to be sustained even in peacetime, we should know it.

MR. JUSTICE RUTLEDGE, dissenting.....

Judged by normal peacetime standards, over-all nation-wide price control hardly has an accepted place in our institutions. Notwithstanding the considerable expansion of recent years in this respect, the extension has been piece-meal. . . . Whether control so extensive might be upheld in some emergency not created by war need not now be decided. That it can be supported in the present circumstances and for the declared purposes there can be no doubt. . . .

My difficulty arises from the Act's procedural provisions. They are too unusual. . . . A procedure so piecemeal, so chopped up, so disruptive of constitutional guaranties in relation to trials for crime, should not, and in my judgment, cannot be validated, as to such proceedings, under the Constitution. Even war does not suspend the protections which are inherently part and parcel of our criminal process. . . .

I am authorized to say that MR. JUSTICE MURPHY joins in this opinion.

L. P. STEUART & BRO., INC., v. BOWLES, PRICE ADMINISTRATOR.

Supreme Court of the United States. 1944.
322 U.S. 398.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Sec. 2 (a) (2) of Title III of the Second War Powers Act (56 Stat. 178) provides in part:

"Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense."

By sec. 2 (a) (8) of the Act the President is granted authority to exercise that power "through such department, agency, or officer of the Government as he may direct and in conformity with any rules or regulations which he may prescribe." That authority, so far as material here, was delegated to the Office of Price Administration, which promulgated Ration Order No. 11, effective October 22, 1942, providing for the rationing of fuel oil. . . . The order inaugurated "a system of rationing control" "to provide for equitable distribution of fuel

oil in the areas of shortage." Fuel oil rations for heat and for hot water were provided. . . . Transfers of fuel oil to consumers were allowed only in exchange for ration coupons. . . . Dealers were required, with exceptions not material here, to keep records of sales to consumers showing their names and addresses, the date and amount of the transfer, and the coupons detached. Provision was also made for "suspension orders" as follows:

"Any person who violates Ration Order No. 11 may, by administrative suspension order, be prohibited from receiving any transfers or deliveries of, or selling or using or otherwise disposing of, any fuel oil or other rationed product or facility. Such suspension order shall be issued for such period as in the judgment of the Administrator . . . is necessary or appropriate in the public interest and to promote the national security."

On December 31, 1943, a suspension order was issued against petitioner, a retail dealer in fuel oil in the District of Columbia. It was found that petitioner had obtained large quantities of fuel oil from its supplier without surrendering any ration coupons. It was found that petitioner had delivered many thousands of gallons of fuel oil to consumers without receiving ration coupons in exchange. . . . Petitioner was also found to have failed to keep the required records showing its transfers of fuel oil to consumers. The suspension order prohibited petitioner from receiving fuel oil for resale or transfer to any consumer for the period from January 15, 1944, to December 31, 1944, the date when the Second War Powers Act expires. The order provided, however, that if petitioner furnished the Office of Price Administration with a list of consumers to whom it had sold fuel oil from October 21, 1941, to October 21, 1942, and if it surrendered all void ration coupons in its possession, it might transfer fuel oil to any consumer to whom it had transferred fuel oil during the year subsequent to October 21, 1941, and receive fuel oil sufficient for that purpose. . . . The suspension order was issued after notice and hearings as provided in the regulations which govern the procedure in such cases.

The present suit was brought in the District Court for the District of Columbia to enjoin the enforcement of the suspension order. A temporary restraining order was issued. Respondents moved for summary judgment. That motion was granted and the complaint was dismissed. On the appeal that judgment was affirmed. . . .

The sole question presented by this case is whether the power of the President . . . to "allocate" materials includes the power to issue suspension orders. . . .

We state the question that narrowly because of the posture of the case as it reaches us. The constitutional authority of Congress to author-

ize as a war emergency measure the allocation or rationing of materials is not challenged. No question of delegation of authority is present. . . . And no question is raised, like those involved in *Yakus v. United States*, 321 U.S. 414, and *Bowles v. Willingham*, 321 U.S. 503, concerning the authority of Congress to delegate to the President in this way the power to allocate materials. . . .

The argument, rather, is that authority to "allocate" materials does not include the power to issue suspension orders; and that no such power will be implied since suspension orders are penalties to which persons will not be subjected unless the statute plainly imposes them. . . .

We agree that it is for Congress to prescribe the penalties for the laws which it writes. . . . Hence we would have no difficulty in agreeing with petitioner's contention if the issue were whether a suspension order could be used as a means of punishment of an offender. But that statement of the question is a distortion of the issue presented on this record.

The problem of the scarcity of materials is often acute and critical in a great war effort such as the present one. Whether the difficulty be transportation or production, there is apt to be an insufficient supply to meet essential civilian needs after military and industrial requirements have been satisfied. . . . Some localities would have plenty; communities less favorably situated would suffer. Allocation or rationing is designed to eliminate such inequalities and to treat all alike who are similarly situated. . . . But middlemen—wholesalers and retailers—bent on defying the rationing system could raise havoc with it. . . . These middlemen are the chief if not the only conduits between the source of limited supplies and the consumers.

From the viewpoint of a rationing system a middleman who distributes the product in violation and disregard of the prescribed quotas is an inefficient and wasteful conduit. . . . Certainly we could not say that the President would lack the power under this Act to take away from a wasteful factory and route to an efficient one a precious supply of material needed for the manufacture of articles of war. . . . The waging of war and the control of its attendant economic problems are urgent business. Yet if the President has the power to channel raw materials into the most efficient industrial units and thus save scarce materials from wastage it is difficult to see why the same principle is not applicable to the distribution of fuel oil.

If petitioner established that he was eliminated as a dealer or that his quota was cut down for reasons not relevant to allocation, quite different considerations would be presented. But we can make no such assumption here. . . . The character of the violations thus negatives the charge that the suspension order was designed to punish petitioner rather

than to protect the distribution system and the interests of conservation. . . .

None of the findings is challenged here. . . . They sustain the conclusion that in restricting petitioner's quota the Office of Price Administration was doing no more than protecting a community against distribution which measured by rationing standards was inequitable, unfair, and inefficient. If the power to "allocate" did not embrace that power it would be feeble power indeed. . . .

MR. JUSTICE ROBERTS dissents.

The Restatement: The New Commerce Power

UNITED STATES *v.* DARBY LUMBER CO.

Supreme Court of the United States. 1941.
312 U.S. 100.

MR. JUSTICE STONE delivered the opinion of the Court.

The two principal questions raised by the record in this case are, *first*, whether Congress has constitutional power to prohibit the shipment in interstate commerce of lumber manufactured by employees whose wages are less than a prescribed minimum or whose weekly hours of labor at that wage are greater than a prescribed maximum, and, *second*, whether it has power to prohibit the employment of workmen in the production of goods "for interstate commerce" at other than prescribed wages and hours. A subsidiary question is whether in connection with such prohibitions Congress can require the employer subject to them to keep records showing the hours worked each day and week by each of his employees. . . .

The Fair Labor Standards Act [of 1938] set up a comprehensive legislative scheme for preventing the shipment in interstate commerce of certain products and commodities produced in the United States under labor conditions as respects wages and hours which fail to conform to standards set up by the Act. . . . The Act also sets up an administrative procedure whereby those standards may from time to time be modified generally as to industries subject to the Act. . . .

The indictment charges that appellees are engaged, in the state of Georgia, in the business of acquiring raw materials, which they manufacture into finished lumber with the intent, when manufactured, to ship it in interstate commerce to customers outside the state. . . . There are numerous counts charging appellees with the shipment . . . to points

outside the state of lumber in the production of which appellees have employed workmen at less than the prescribed minimum wage or more than the prescribed maximum hours without payment to them of any wage for overtime. . . . Still another count charges appellees with failure to keep records showing the hours worked each day a week by each of their employees.

The case comes here on assignments by the Government that the district court erred insofar as it held that Congress was without constitutional power to penalize the acts set forth in the indictment, and appellees seek to sustain the decision below on the grounds that the prohibition by Congress of those acts is unauthorized by the commerce clause and is prohibited by the Fifth Amendment. . . .

While manufacture is not of itself interstate commerce the shipment of manufactured goods interstate is such commerce and the prohibition of such shipment by Congress is indubitably a regulation of the commerce. The power to regulate commerce is the power "to prescribe the rule by which commerce is governed." *Gibbons v. Ogden*, 9 Wheat. 1, 196. It extends not only to those regulations which aid, foster and protect the commerce, but embraces those which prohibit it. . . . It is conceded that the power of Congress to prohibit transportation in interstate commerce includes noxious articles, stolen articles, kidnapped persons, and articles such as intoxicating liquor or convict made goods, traffic in which is forbidden or restricted by the laws of the state of destination. . . .

But it is said that the present prohibition falls within the scope of none of these categories; that while the prohibition is nominally a regulation of the commerce its motive or purpose is regulation of wages and hours of persons engaged in manufacture, the control of which has been reserved to the states and upon which Georgia and some of the states of destination have placed no restriction; that the effect of the present statute is not to exclude the prescribed articles from interstate commerce in aid of state regulation as in *Kentucky Whip & Collar Co. v. Illinois Central R. R. Co.*, [299 U.S. 334,] but instead, under the guise of a regulation of interstate commerce, it undertakes to regulate wages and hours within the state contrary to the policy of the state which has elected to leave them unregulated.

The power of Congress over interstate commerce "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed by the Constitution." *Gibbons v. Ogden*, *supra*, 196. That power can neither be enlarged nor diminished by the exercise or non-exercise of state power. . . . Congress, following its own conception of public policy concerning the restrictions which may appropriately be imposed on interstate commerce, is free to

exclude from commerce articles whose use in the states for which they are destined it may conceive to be injurious to the public health, morals or welfare, even though the state has not sought to regulate their use. . . .

Such regulation is not a forbidden invasion of state power merely because either its motive or its consequence is to restrict the use of articles of commerce within the states of destination and is not prohibited unless by other constitutional provisions. It is no objection to the assertion of the power to regulate interstate commerce that its exercise is attended by the same incidents which attend the exercise of the police power of the states. *Seven Cases v. United States*, 239 U.S. 510, 514; *Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U.S. 146, 156; *United States v. Carolene Products Co.*, 304 U.S. 144, 147; *United States v. Appalachian Electric Power Co.*, 311 U.S. 377.

The motive and purpose of the present regulation is plainly to make effective the Congressional conception of public policy that interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions, which competition is injurious to the commerce and to the states from and to which the commerce flows. The motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control. . . . Whatever their motive and purpose, regulations of commerce which do not infringe some constitutional prohibition are within the plenary power conferred on Congress by the Commerce Clause. Subject only to that limitation, presently to be considered, we conclude that the prohibition of the shipment interstate of goods produced under the forbidden substandard labor conditions is within the constitutional authority of Congress.

In the more than a century which has elapsed since the decision of *Gibbons v. Ogden*, these principles of constitutional interpretation have been so long and repeatedly recognized by this Court as applicable to the Commerce Clause, that there would be little occasion for repeating them now were it not for the decision of this Court twenty-two years ago in *Hammer v. Dagenhart*, 247 U.S. 251. In that case it was held by a bare majority of the Court over the powerful and now classic dissent of Mr. Justice Holmes setting forth the fundamental issues involved, that Congress was without power to exclude the products of child labor from interstate commerce. The reasoning and conclusion of the Court's opinion there cannot be reconciled with the conclusion which we have reached, that the power of Congress under the Commerce Clause is plenary to exclude any article from interstate commerce subject only to the specific prohibitions of the Constitution.

Hammer v. Dagenhart has not been followed. The distinction on which the decision was rested that Congressional power to prohibit interstate commerce is limited to articles which in themselves have some harmful or deleterious property—a distinction which was novel when made and unsupported by any provision of the Constitution—has long since been abandoned. . . . The thesis of the opinion that the motive of the prohibition or its effect to control in some measure the use or production within the state of the article thus excluded from the commerce can operate to deprive the regulation of its constitutional authority has long since ceased to have force. . . . And finally we have declared “the authority of the federal government over interstate commerce does not differ in extent or character from that retained by the states over intrastate commerce.” *United States v. Rock Royal Cooperative, Inc.*, 307 U.S. 533, 569.

The conclusion is inescapable that *Hammer v. Dagenhart* was a departure from the principles which have prevailed in the interpretation of the commerce clause both before and since the decision and that such vitality, as a precedent, as it then had has long since been exhausted. It should be and now is overruled.

Section 15(a)(2) and §§ 6 and 7 require employers to conform to the wage and hour provisions with respect to all employees engaged in the production of goods for interstate commerce. As appellees’ employees are not alleged to be “engaged in interstate commerce” the validity of the prohibition turns on the question whether the employment, under other than the prescribed labor standards, of employees engaged in the production of goods for interstate commerce is so related to the commerce and so affects it as to be within the reach of the power of Congress to regulate it.

To answer this question we must at the outset determine whether the particular acts charged . . . constitute “production for commerce” within the meaning of the statute . . .

Without attempting to define the precise limits of the phrase, we think the acts alleged in the indictment are within the sweep of the statute. The obvious purpose of the Act was not only to prevent the interstate transportation of the proscribed product, but to stop the initial step toward transportation, production with the purpose of so transporting it. Congress was not unaware that most manufacturing businesses shipping their product in interstate commerce make it in their shops without reference to its ultimate destination and then after manufacture select some of it for shipment interstate and some intrastate according to the daily demands of their business, and that it would be practically impossible, without disrupting manufacturing businesses, to restrict the prohibited kind of production to the particular pieces of lumber, cloth,

furniture or the like which later move in interstate rather than intrastate commerce. . . .

The recognized need of drafting a workable statute and the well known circumstances in which it was to be applied are persuasive of the conclusion, which the legislative history supports, that the "production for commerce" intended includes at least the production of goods, which at the time of production, the employer, according to the normal course of his business, intends or expects to move in interstate commerce although, through the exigencies of the business, all of the goods may not thereafter actually enter interstate commerce.

There remains the question whether such restriction on the production of goods for commerce is a permissible exercise of the commerce power. The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce. *Kidd v. Pearson*, 128 U.S. 1; *Bacon v. Illinois*, 227 U.S. 504; *Heisler v. Thomas Colliery Co.*, 260 U.S. 245; *Oliver Iron Co. v. Lord*, 262 U.S. 172.

But it does not follow that Congress may not by appropriate legislation regulate intrastate activities where they have a substantial effect on interstate commerce. . . . A recent example is the National Labor Relations Act for the regulation of employer and employee relations in industries in which strikes, induced by unfair labor practices named in the Act, tend to disturb or obstruct interstate commerce. . . . But long before the adoption of the National Labor Relations Act this Court had many times held that the power of Congress to regulate interstate commerce extends to the regulation through legislative action of activities intrastate which have a substantial effect on the commerce or the exercise of the Congressional power over it. . . .

Congress, having by the present Act adopted the policy of excluding from interstate commerce all goods produced for the commerce which do not conform to the specified labor standards, it may choose the means reasonably adapted to the attainment of the permitted end, even though they involve control of intrastate activities. Such legislation has often been sustained with respect to powers, other than the commerce power granted to the national government, when the means chosen, although not themselves within the granted power, were nevertheless deemed appropriate aids to the accomplishment of some purpose within an admitted power of the national government. . . . A familiar like exercise of power is the regulation of intrastate transactions which are so commingled with or related to interstate commerce that all must be

regulated if the interstate commerce is to be effectively controlled. *Shreveport Case*, 234 U.S. 342; *Wisconsin Railroad Comm'n v. Chicago, B. & Q. R. R. Co.*, 257 U.S. 563; *United States v. New York Central R. R. Co.*, [272 U.S. 457;] *Currin v. Wallace*, 306 U.S. 1; *Mulford v. Smith*, [307 U.S. 38.] Similarly Congress may require inspection and preventive treatment of all cattle in a disease infected area in order to prevent shipment in interstate commerce of some of the cattle without the treatment. *Thornton v. United States*, 271 U.S. 414. It may prohibit the removal, at destination, of labels required by the Pure Food & Drugs Act to be affixed to articles transported in interstate commerce. *McDermott v. Wisconsin*, 228 U.S. 115. And we have recently held that Congress in the exercise of its power to require inspection and grading of tobacco shipped in interstate commerce may compel such inspection and grading of all tobacco sold at local auction rooms from which a substantial part but not all of the tobacco sold is shipped in interstate commerce. *Currin v. Wallace*, *supra*. 11. . . .

We think also that #15(a)(2), now under consideration, is sustainable independently of #15(a)(1), which prohibits shipment or transportation of the proscribed goods. As we have said, the evils aimed at by the Act are the spread of substandard labor conditions through the use of the facilities of interstate commerce for competition by the goods so produced with those produced under the prescribed or better labor conditions; and the consequent dislocation of the commerce itself caused by the impairment or destruction of local businesses by competition made effective through interstate commerce. The Act is thus directed at the suppression of a method or kind of competition in interstate commerce which it has in effect condemned as "unfair," as the Clayton Act has condemned other "unfair methods of competition" made effective through interstate commerce. . . .

The means adopted by #15(a)(2) for the protection of interstate commerce by the suppression of the production of the condemned goods for interstate commerce is so related to the commerce and so affects it as to be within the reach of the commerce power. . . . Congress, to attain its objective in the suppression of nationwide competition in interstate commerce by goods produced under substandard labor conditions, has made no distinction as to the volume or amount of shipments in the commerce or of production for commerce by any particular shipper or producer. It recognized that in present day industry, competition by a small part may affect the whole and that the total effect of the competition of many small producers may be great. . . . The legislation aimed at a whole embraces all its parts. . . .

So far as *Carter v. Carter Coal Co.*, 298 U.S. 238, is inconsistent with this conclusion, its doctrine is limited in principle by the decisions under

the Sherman Act and the National Labor Relations Act, which we have cited and which we follow. . . .

Our conclusion is unaffected by the Tenth Amendment. . . . The amendment states but a truism that all is retained which has not been surrendered. . . .

(The requirements of records of wages and hours in #15(a)(5) and #11(c) are incidental to those for the prescribed wages and hours, and hence validity of the former turns on validity of the latter. . . . The requirement for records even of the intrastate transaction is an appropriate means to the legitimate end. . . .)

. . . . Since our decision in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, it is no longer open to question that the fixing of a minimum wage is within the legislative power and that the bare fact of its exercise is not a denial of due process under the Fifth more than under the Fourteenth Amendment. Nor is it any longer open to question that it is within the legislative power to fix maximum hours. . . . Similarly the statute is not objectionable because applied alike to both men and women.

The Act is sufficiently definite to meet constitutional demands No more is required. . . .

UNITED STATES *v.* APPALACHIAN ELECTRIC POWER CO.

Supreme Court of the United States. 1940.

311 U.S. 377.

MR. JUSTICE REED delivered the opinion of the Court.

This case involves the scope of the federal commerce power in relation to conditions in licenses, required by the Federal Power Commission, for the construction of hydroelectric dams in navigable rivers of the United States. To reach this issue requires, preliminarily, a decision as to the navigability of the New River, a watercourse flowing through Virginia and West Virginia. The district court and the circuit court of appeals have both held that the New River is not navigable, and that the United States cannot enjoin the respondent from constructing and putting into operation a hydroelectric dam situated in the river just above Radford, Virginia. . . .

Concurrent findings. The district court's finding that the New River was not navigable was concurred in by the circuit court of appeals after a careful appraisal of the evidence in the record. Both courts stated in detail the circumstantial facts relating to the use of the river and its physical characteristics, such as volume of water, swiftness and obstructions. There is no real disagreement between the parties here concerning

these physical and historical evidentiary facts. But there are sharp divergencies of view as to their reliability as indicia of navigability and the weight which should be attributed to them. The disagreement is over the ultimate conclusion upon navigability to be drawn from this uncontroverted evidence.

The respondent relies upon this Court's statement that "each determination as to navigability must stand on its own facts," *United States v. Utah*, 283 U.S. 64, 87, and upon the conventional rule that factual findings concurred in by two courts will be accepted by this Court unless clear error is shown.

In cases involving the navigability of water courses, this Court, without expressly passing on the finality of the findings, on some occasions has entered into consideration of the facts found by two courts to determine for itself whether the courts have correctly applied to the facts found the proper legal tests. When we deal with issues such as these before us, facts and their constitutional significance are too closely connected to make the two-court rule a serviceable guide. The legal concept of navigability embraces both public and private interests. It is not to be determined by a formula which fits every type of stream under all circumstances and at all times. Our past decisions have taken due account of the changes and complexities in the circumstances of a river. We do not purport now to lay down any single definitive test. We draw from the prior decisions in this field and apply them, with due regard to the dynamic nature of the problem, to the particular circumstances presented by the New River. To these circumstances certain judicial standards are to be applied for determining whether the complex of the conditions in respect to its capacity for use in interstate commerce render it a navigable stream within the Constitutional requirements. Both the standards and the ultimate conclusion involve questions of law inseparable from the particular facts to which they are applied.

Navigability. The power of the United States over its waters which are capable of use as interstate highways arises from the commerce clause of the Constitution. "The Congress shall have Power. . . . To regulate Commerce . . . among the several States." It was held early in our history that the power to regulate commerce necessarily included power over navigation. *Gibbons v. Ogden*, 9 Wheat. 1, 189. To make its control effective the Congress may keep the "navigable waters of the United States" open and free and provide by sanctions against any interference with the country's water assets. It may legislate to forbid or license dams in the waters, *Wilson v. Black Bird Creek Marsh Co.*, 2 Pet. 245, 250; its power over improvements for navigation in rivers is "absolute." *United States v. River Rouge Co.*, 269 U.S. 411, 419.

The states possess control of the waters within their borders, "subject

to the acknowledged jurisdiction of the United States under the Constitution in regard to commerce and the navigation of the waters of rivers," *St. Anthony Falls Water Power Co. v. Water Commissioners*, 168 U.S. 349, 366. It is this subordinate local control that, even as to navigable rivers, creates between the respective governments a contrariety of interests relating to the regulation and protection of waters through licenses, the operation of structures and the acquisition of projects at the end of the license term. But there is no doubt that the United States possesses the power to control the erection of structures in navigable waters.

The navigability of the New River is, of course, a factual question, but to call it a fact cannot obscure the diverse elements that enter into the application of the legal tests as to navigability. We are dealing here with the sovereign powers of the Union, the Nation's right that its waterways be utilized for the interests of the commerce of the whole country. It is obvious that the uses to which the streams may be put vary from the carriage of ocean liners to the floating out of logs; that the density of traffic varies equally widely from the busy harbors of the seacoast to the sparsely settled regions of the Western mountains. The tests as to navigability must take these variations into consideration.

Both lower courts based their investigation primarily upon the generally accepted definition of *The Daniel Ball*, 10 Wall. 557, 563. In so doing they were in accord with the rulings of this Court on the basic concept of navigability. Each application of this test, however, is apt to uncover variations and refinements which require further elaboration.

In the lower courts and here, the Government urges that the phrase "susceptible of being used, in their ordinary condition," in the *Daniel Ball* definition, should not be construed as eliminating the possibility of determining navigability in the light of the effect of reasonable improvements. The district court thought the argument inapplicable.

The circuit court of appeals said:

"If this stretch of the river was not navigable in fact in its unimproved condition, it is not to be considered navigable merely because it might have been made navigable by improvements which were not in fact made. Of course if the improvements had been made the question of fact might have been different." 107 F. 2d at 786.

To appraise the evidence of navigability on the natural condition only of the waterway is erroneous. Its availability for navigation must also be considered. . . . A waterway, otherwise suitable for navigation, is not barred from that classification merely because artificial aids must make the highway suitable for use before commercial navigation may be undertaken. . . . The district court is quite right in saying there are obvious limits to such improvements as affecting navigability.

These limits are necessarily a matter of degree. There must be a balance between cost and need at a time when the improvement would be useful. When once found to be navigable, a waterway remains so. This is no more indefinite than a rule of navigability in fact as adopted below based upon "useful interstate commerce" or "general and common usefulness for purposes of trade and commerce" if these are interpreted as barring improvements. 107 F. 2d at 780. Nor is it necessary that the improvements should be actually completed or even authorized. The power of Congress over commerce is not to be hampered because of the necessity for reasonable improvements to make an interstate highway available for traffic.

. . . . There has never been doubt that the navigability referred to in the cases was navigability despite the obstruction of falls, rapids, sand bars, carries or shifting currents. The plenary federal power over commerce must be able to develop with the needs of that commerce which is the reason for its existence. It cannot properly be said that the federal power over navigation is enlarged by the improvements to the waterways. It is merely that improvements make applicable to certain waterways the existing power over commerce. In determining the navigable character of the New River it is proper to consider the feasibility of interstate use after reasonable improvements which might be made.

Nor is it necessary for navigability that the use should be continuous. The character of the region, its products and the difficulties or dangers of the navigation influence the regularity and extent of the use. Small traffic compared to the available commerce of the region is sufficient. Even absence of use over long periods of years, because of changed conditions, the coming of the railroad or improved highways does not affect the navigability of rivers in the constitutional sense. *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 329. It is well recognized too that the navigability may be of a substantial part only of the waterway in question. Of course, these evidences of nonnavigability in whole or in part are to be appraised in totality to determine the effect of all. With these legal tests in mind we proceed to examine the facts to see whether the 111-mile reach of this river from Allisonia to Hinton, across the Virginia-West Virginia state line, has "capability of use by the public for the purposes of transportation and commerce." *The Montello*, 20 Wall. 430, 441. . . .

[The Court finds that the New River is a navigable water of the United States.]

License Provisions. The determination that the New River is navigable eliminates from this case issues which may arise only where the river involved is nonnavigable. But even accepting the navigability of the New River, the respondent urges that certain provisions of the license,

which seek to control the affairs of the licensee, are unconnected with navigation and are beyond the power of the Commission, indeed beyond the constitutional power of Congress to authorize. . . .

The respondent's objections to the statutory and license provisions, as applied to navigable streams, are based on the contentions (1) that the United States' control of the waters is limited to control for purposes of navigation, (2) that certain license provisions take its property without due process, and (3) that the claimed right to acquire this project and to regulate its financing, records and affairs, is an invasion of the rights of the states, contrary to the Tenth Amendment.

Forty-one states join as *amici* in support of the respondent's arguments. While conceding, as of course, that Congress may prohibit the erection in navigable waters of the United States of any structure deemed to impair navigation, the Attorneys General speaking for the states insist that this power of prohibition does not comprehend a power to exact conditions, which are unrelated to navigation, for the permission to erect such structures. To permit, the argument continues, the imposition of licenses involving conditions such as this acquisition clause¹ enabling the Federal Government to take over a natural resource such as water-power, allows logically similar acquisition of mines, oil or farmlands as consideration for the privilege of doing an interstate business. The states thus lose control of their resources and property is withdrawn from taxation in violation of the Tenth Amendment.

Further, the point is made that a clash of sovereignty arises between the license provisions of the Power Act and state licensing provisions. The Commonwealth of Virginia advances forcibly its contention that the affirmative regulation of water-power projects on its navigable streams within its boundaries rests with the state, beyond that needed for navigation.² Virginia has a Water Power Act. It, too, offers a fifty-year license, with the right to use the natural resources of the state, the stream flow and the beds of the water courses for the period of the

¹ By section 14 of the license the United States retained the right to acquire the concession upon the expiration of the license-term of 50 years by paying the fair value of the property to the licensee. The right of the United States or of any state or municipality to condemn the project at any time was also stipulated.—Ed.

² Section 10 (a) of the license requires that the project be adapted to beneficial public uses, including therein interstate commerce, water-power development, and recreational facilities.

Section 10 (c) requires the licensee to maintain financial reserves to cover depreciation and replacements, and forces the licensee to conform to the federal power commission's regulations regarding the protection of life and property; it further empowers the United States to expropriate excessive profits (undefined) during the first 20 years in which the license runs, until the state prohibits such profits.

Section 11 provides among other things that the licensee shall provide the United States, free of cost, with lands and rights of way, and with power, for the operation of and improvement of facilities for navigation.—Ed.

license or its extensions subject to state condemnation at any time on Virginia's terms for ascertainment of value. Operation is likewise regulated by state law. The Commonwealth objects that the development of its water power resources is subjected to Federal Power Act requirements such as are detailed above in stating the respondent's objection, even to the point that Virginia itself may not build and operate a dam in navigable water without authorization and regulation by the Federal Government.

. . . . To predetermine, even in the limited field of water power, the rights of different sovereignties, pregnant with future controversies, is beyond the judicial function. The courts deal with concrete legal issues, presented in actual cases, not abstractions. The possibility of other uses of the coercive power of license, if it is here upheld, is not before us. We deem the pictured extremes irrelevant save as possibilities for consideration in determining the present question of the validity of the challenged license provisions. To this we limit this portion of our decision.

The respondent is a riparian owner with a valid state license to use the natural resources of the state for its enterprise. Consequently it has as complete a right to the use of the riparian lands, the water, and the river bed as can be obtained under state law. The state and respondent alike, however, hold the waters and the lands under them subject to the power of Congress to control the waters for the purpose of commerce. The power flows from the grant to regulate, i. e., to "prescribe the rule by which commerce is to be governed." *Gibbons v. Ogden*, 9 Wheat. 1, 196. This includes the protection of navigable waters in capacity as well as use. This power of Congress to regulate commerce is so unfettered that its judgment as to whether a structure is or is not a hindrance is conclusive. Its determination is legislative in character. The Federal Government has domination over the water power inherent in the flowing stream. It is liable to no one for its use or non-use. The flow of a navigable stream is in no sense private property. Exclusion of riparian owners from its benefits without compensation is entirely within the Government's discretion.

Possessing this plenary power to exclude structures from navigable waters and dominion over flowage and its product, energy, the United States may make the erection or maintenance of a structure in a navigable water dependent upon a license. . . .

It is quite true that the criticized provisions are not essential to or even concerned with navigation as such. . . .

In our view, it cannot properly be said that the constitutional power of the United States over its waters is limited to control for navigation. In truth the authority of the United States is the regulation of

commerce on its waters. Navigability is but a part of this whole. Flood protection, watershed development, recovery of the cost of improvements through utilization of power are likewise parts of commerce control. As respondent soundly argues, the United States cannot by calling a project of its own "a multiple purpose dam" give to itself additional powers, but equally truly the respondent cannot, by seeking to use a navigable waterway for power generation alone, avoid the authority of the Government over the stream. That authority is as broad as the needs of commerce. Water power development from dams in navigable streams is from the public's standpoint a by-product of the general use of the rivers for commerce. To this general power, the respondent must submit its single purpose of electrical production. . . . The point is that navigable waters are subject to national planning and control in the broad regulation of commerce granted the Federal Government. The license conditions to which objection is made have an obvious relationship to the exercise of the commerce power. Even if there were no such relationship the plenary power of Congress over navigable waters would empower it to deny the privilege of constructing an obstruction in those waters. It may likewise grant the privilege on terms. . . .

. . . . It is now a question whether the Government in taking over the property may do so at less than a fair value. It has been shown that there is no private property in the flow of the stream. This has no assessable value to the riparian owner. If the Government were now to build the dam, it would have to pay the fair value, judicially determined, for the fast land; nothing for the water power. We assume without deciding that these riparian rights may pass to the United States for less than their value. In our view this "is the price which (respondents) must pay to secure the right to maintain their dam." The quoted words are the conclusion of the opinion in *Fox River Co. v. Railroad Commission*, 274 U.S. 651. The case is decisive on the issue of confiscation. . . . The fact that the *Fox River* case involved a state and that this case involves the United States is immaterial from the due process standpoint. Since the United States might erect a structure in these waters itself, even one equipped for electrical generation, it may constitutionally acquire one already built.

Such an acquisition or such an option to acquire is not an invasion of the sovereignty of a state. At the formation of the Union, the states delegated to the Federal Government authority to regulate commerce among the states. So long as the things done within the states by the United States are valid under that power, there can be no interference with the sovereignty of the state. It is the non-delegated power which under the Tenth Amendment remains in the state or the people. . . .

THE CHIEF JUSTICE took no part in the consideration or decision of this case.

MR. JUSTICE ROBERTS, dissenting. . . .

A river is navigable in law if it is navigable in fact. . . .

The evidence supports,—indeed I think it requires,—a finding that, applying accepted criteria, New River is not, and never has been, in fact navigable. On this record the rule of decision, many times announced by this court, that the concurrent findings of fact of two lower courts, if supported by substantial evidence, will be accepted here, requires affirmance of the judgment. The rule applies not only to evidentiary facts but to conclusions of fact based thereon. . . .

The petitioner, in effect, asks this court to convict the courts below of error in determining the credibility, weight and relevance of the evidence. But that determination is peculiarly within their province, as this court has often said. The doctrine applies in this case with special force. . . .

As shown by the cases cited in the margin, a stream to be navigable in fact must have “a capacity for general and common usefulness for purposes of trade and commerce.” If the findings below had been the other way, the Government would be here strenuously contending that they could not be set aside, as it successfully did in *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77. . . .

. . . . If anything has been settled by our decisions it is that, in order for a water to be found navigable, navigability in fact must exist under “natural and ordinary conditions.” This means all conditions, including a multiplicity of obstacles, falls and rapids which make navigation a practical impossibility. The court now, however, announces that “natural and ordinary conditions” refers only to volume of water gradients, and regularity of flow. No authority is cited and I believe none can be found for thus limiting the connotation of the phrase. But further the court holds, contrary to all that has heretofore been said on the subject, that the natural and ordinary condition of the stream, however impassable it may be without improvement, means that if, by “reasonable” improvement, the stream may be rendered navigable then it is navigable without such improvement. No authority is cited and I think none can be cited which countenance any such test. Who is to determine what is a reasonable or an unreasonable improvement in the circumstances; or what is a proper balance between cost and need? If these questions must be answered it is for Congress, certainly not for this court, to answer them. If this test be adopted, then every creek in every state of the Union which has enough water, when conserved by dams and locks or chan-

nelled by wing dams and sluices, to float a boat drawing two feet of water, may be pronounced navigable because, by the expenditure of some enormous sum, such a project would be possible of execution. In other words, Congress can create navigability by determining to improve a non-navigable stream.

If this criterion be the correct one, it is not seen how any stream can be found not to be navigable nor is it seen why this court and other federal courts have been at pains for many years to apply the other tests mentioned when the simple solution of the problem in each case would have been to speculate as to whether, at "reasonable" cost, the United States could render a most difficult and forbidding mountain torrent suitable for the least pretentious form of water traffic. In the light of the court's opinion, if this test be applied to the New River it must, of course, be admitted that by blasting out channels through reefs and shoals, by digging canals around falls and rapids, and possibly by dams and locks, the New River could be rendered fit for some sort of commercial use. What the expense would be no one knows. Obviously it would be enormous. Congress in the past has undertaken to render the river navigable and decades ago gave up the attempt. Still we are told that, at "reasonable" cost, the thing can be done, and so the stream is navigable. . . .

MR. JUSTICE McREYNOLDS concurs in this opinion.

CHAPTER XII

The New Deal and State Power

THE BREAK-DOWN OF THE NATIONAL ECONOMY

Panic struck the New York Stock Exchange on October 24, 1929. During that month, the market value of the stocks listed there dropped thirty-two billion dollars—from eighty-seven billions to fifty-five billions. By March 1, 1933, this value had fallen to nineteen billions.

Taking the period of 1923-1925 as an average, in March, 1933, the index of industrial production was 60; that of employment in factories stood at 61; the index of construction had dropped to 14.

The aggregate national income in terms of 1929 dollars had shrunk in March, 1933, from 81.9 billions to 43.5 billions. The income of the employee group had declined about 43 per cent.—twenty-three billion dollars; that of the individual enterpriser group diminished about 41 per cent., or six billion dollars. The purchasing power of the farmer had fallen off 50 per cent. Investors and property holders had lost about 40 per cent. of their income, or about five billions. The number of unemployed workers of all classes was estimated to be 15,000,000.¹

Under the leadership of President Roosevelt, The New Deal approached the task of salvaging the country with the theory that the depression was due not to a turn in the traditional business cycle but to fundamental faults in the structure of the national economy. Basic to this view was the proposition that production was geared to the making of as large profits as possible for business men and bankers. It was assumed as a working hypothesis that prices were fixed, not by the give and take of a "free" market, responsive to consumer-demand, but by an intricate system of controls in the hands of the directors of the great corporations and of the banking world.² President Roosevelt informed Congress on April 29, 1938, that one-tenth of 1 per cent. of all the corporations in the country owned 52 per cent of the corporate wealth of the nation,

¹ These figures are taken from Louis M. Hacker, *American Problems of Today* (New York, 1938), p. 178; and Harold G. Moulton, *Income and Economic Progress* (The Brookings Institution, 1935), pp. 28-30.

² The best study of the corporation is that of A. A. Berle and G. C. Means, *The Modern Corporation and Private Property* (New York, 1933). On prices, see G. C. Means, "Industrial Prices and Their Relative Inflexibility," S. Doc. No. 13, 74 Congress, 1st Sess. (Government Printing Office, 1935).

and that the income of this group comprised about 50 per cent. of the net corporate income. He also made the statement that 5 per cent. of the corporations owned 87 per cent. of all corporate assets and that less than 4 per cent. earned 84 per cent. of the total net income.

A parallel situation was found to exist in terms of income. Families, for instance, with an income of \$10,000 or over numbered in 1929 only 2.3 per cent. of the total number of families, but drew 28 per cent. of the total family income. Of an estimated 27,474,000 families, 25,000,000 received less than \$5000 a year. Nearly three-quarters of the families (71.2 per cent.) were receiving less than \$2500 a year, and 42 per cent. of the total had an income of less than \$1500 a year.³

As the New Deal read the causes of the depression, then, the capacity of the industrial mechanism to produce had outstripped the purchasing power of the people at the price-levels then prevailing. These price-levels were fixed not by the laws of supply and demand but by the directors of Big Business. It was the failure of purchasing power which could be brought to the market, and not the failure of the sources of production, which had caused the depression.

This condition of things smacked more of the Marxian apocalypse than it did of the business cycle.⁴ The President undertook together and at once the work of recovery and reform. The governmental remedies which it became the policy of the New Deal to apply became, in turn, problems of constitutionalism which it was the duty of the Supreme Court to fathom. From this point on, we select for our attention those statutes which were brought by litigation before the Supreme Court for a test of their constitutionality.

Before taking up the cases dealing with the great enactments of the New Deal, it seems advisable to turn to several decisions of the Court on the validity of state legislation which was the direct product of conditions arising from the depression.

In *Nebbia v. New York*, the opening case, the Court upheld an act regulating the prices to be charged for milk. By that decision the Court abandoned its historic objection to price-fixing. It did so without overruling any previous decision by interpreting the doctrine of business affected with a public interest in a manner to deprive that doctrine of significance. "The phrase, 'affected with a public interest' can, in the

³ M. Leven and others, *America's Capacity to Consume* (The Brookings Institution, 1934). With this should be read its twin, E. G. Nourse and others, *America's Capacity to Produce*. The figures on income are drawn from the former work.

⁴ Such an outcome was actually foreseen by a number of professional liberal publicists. See, for example, Lewis Corey, *The Crisis of the Middle Class* (New York, 1935); and George Soule, *The Coming American Revolution* (New York, 1934). The last chapter of *The Modern Corporation and Private Property* is relevant here also.

nature of things, mean no more than that an industry, for adequate reason, is subject to control for the public good." Mr. Justice Roberts, speaking for the Court, used sweeping language which was bound to commit the Court when it passed upon the validity of certain federal laws. "There can be," he added, "no doubt that upon proper occasion and by appropriate measures the state may regulate a business in any of its aspects, including the prices to be charged for the products or commodities it sells;" and, further, "a state is free to adopt whatever economic policy may reasonably be deemed to promote the public welfare, and to enforce that policy by legislation adapted to its purpose." Since due process means in the Fifth Amendment what it means in the Fourteenth, that particular barrier to this type of social legislation seemed levelled once and for all. The decision was made, however, against a stiff dissent. The majority was formed by a combination of the Chief Justice and Mr. Justice Roberts with the three liberals, Brandeis, Stone and Cardozo. Mr. Justice Roberts spoke for the Court.

The Court proceeded along the same path in the next case reproduced here, that of the Washington minimum wage law. But this time it was fettered by precedents which there was no avoiding. Notably there was the decision in the case of the *Children's Hospital*. If the minimum wage law was to be sustained, then *Adkins v. Children's Hospital* must be overruled. This the Court did. In place of the principle applied there, the Court (speaking now through the Chief Justice) announced a new definition of the meaning of the word "liberty"—"the liberty safeguarded" by due process "is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people." The definition is new in its orientation. Formerly, the individual came first, with his inherent freedoms; the social will was inhibited by them. Now, society comes first, and the individual may enjoy only what freedom is left over after the will of society has satisfied the needs of society. A new concept of the state is making its appearance here: that of the welfare or service state. It is taking the place of the traditional concept of the policeman state—the state of which the primary functions are to maintain law and order and to protect property. But if this definition has a concrete meaning, the Chief Justice did not reveal it. Its meaning can be discovered only by its application to specific fact-situations as the decisions are handed down. It may be noted in passing that the Court divided in this case exactly as it had in the New York milk case.

With these two cases belongs a third, *Home Building & Loan Ass'n v. Blaisdell*, decided in 1934 and upholding the Minnesota moratorium law. It is given in the chapter (III) on the sanctity of contracts and should be read again for its relevance here. It will be observed that the

Court split here exactly as it did in the cases just noted. The opinions in these three cases amount to a juridical new deal for the states.

The next four cases may usefully be grouped together as labor cases. Their philosophy harmonizes with that which dominated the Court in the great line of federal cases which followed the enactment of the Wagner Act and the establishment of the National Labor Relations Board. While only the *Senn* case springs from the early days of the New Deal, all of them mark fundamental departures from doctrine that had hitherto been prevailing in the Court's jurisprudence. They are consequently steps in that revision which is the subject of the present section. Close attention should be given to the dissenting opinions. Only in the *Senn* case did the dissent come from that embattled band which vainly attempted to stem the new thought. In the other cases the opinions came from the reconstructed Court itself.

All four cases fall within the field of civil or political liberties. All four are embraced within the coverage of the First Amendment. The *Bridges Case*, in spite of its associations, is a straight case on the freedom of the press. The *Thomas Case* is a modern hybrid: the precise issue is the power of a state to require the registration of labor organizers. The question seems to be whether such registration is an application of previous restraint to freedom of speech. The *Senn* and *Angelos* cases throw the protection of the First Amendment over the picket line, and are the product of a philosophy which received formal statement in two cases not presented here: *Thornhill v. Alabama*, 310 U.S. 88, and *DeJonge v. Oregon*, 299 U.S. 353, decided in 1937. The former deals specifically with peaceful picketing; the latter, with free assemblage. The *Senn* case provides a brief restatement of the doctrine; the *Angelos* case extends it.

The Police Power and Price-Fixing

NEBBIA v. NEW YORK.

Supreme Court of the United States. 1934.
291 U.S. 502.

Mr. Arthur E. Sutherland, Jr., with whom Mr. Arthur E. Sutherland was on the brief, for appellant.

Statutes similar to this have repeatedly been condemned under the Fourteenth Amendment for fixing prices of common commodities or services. Almost identical was *Williams v. Standard Oil Co.*, 278 U.S. 235, involving a Tennessee statute which attempted to do for gasoline what the statute here attempts to do for milk. . . . The only important point of difference lies in the clause of the present Act which purports to end the powers of the Milk Control Board on March 31, 1934.

In several important cases construing the Fourteenth Amendment, this Court has selected the dairy and the grocery as among the best possible examples of essentially private businesses, to which the traditional "public utility" concept can not be applied. Cf. *New State Ice Co. v. Liebmann*, 285 U.S. 262. . . .

The Milk Control Law, here under discussion, was drawn with the *Ice* case before the author, for the preamble contains quotations from the opinion in that case. In an effort to escape from the effect of that decision, the Legislature did not start out with a requirement that all new milk dealers obtain a "certificate of convenience and necessity." Instead, it proceeded to fix the minimum price of milk as though the supply were less than is actually the case. Obviously some persons, like *Nebbia*, will not be able to sell at the heightened price, inasmuch as there is an oversupply of milk for sale. To such a dealer the Legislature gives the alternative of voluntarily ceasing sales, or being obliged to cease under penalty sanctions or injunctive process, or by being denied a license to carry on business. If enough people can thus be put out of the milk business, the effect will be the same as though a "certificate of convenience and necessity" were exacted as a condition of continuing to sell milk. The difference is one of form only. . . .

In *Adkins v. Children's Hospital*, 261 U.S. 525, the method of fixing the minima was strikingly like the method here. The opinion emphasized as one of the principal faults of the statute that "the declared basis" of the minimum wage "is not the value of the service rendered, but the extraneous circumstance that the employee needed to get a prescribed sum of money to insure her subsistence, health and morals.

Similarly in the case at bar, the laudable desire to see the dairy farmer happier and more prosperous has brought the New York Legislature to say that, regardless of the retail value of milk as fixed by oversupply and limited demand, the dealer must sell to his customers at a fixed minimum, or else not sell. . . .

Price or wage fixing by state statute has been found invalid in *Wolff Packing Co. v. Industrial Court*, 262 U.S. 522, . . . ; *Fairmont Creamery Co. v. Minnesota*, 274 U.S. 1, . . . ; *Tyson Bros. v. Banton*, 273 U.S. 418 . . . ; *Ribnik v. McBride*, 277 U.S. 350. . . .

The Milk Control Law, as applied by the order of the Board, discriminates unfairly against *Nebbia* as a "cash-and-carry" dealer in milk. Having paid 8¢ per quart and 5¢ per pint to the dealer who supplied him, he was obliged to resell over his counter at not less than 9¢ per quart and 6¢ per pint. Some rival in trade, having no store, but a wagon and delivery route, had no lower limit set for the price at which he was obliged to buy his milk; and was allowed to sell pints of milk as low as *Nebbia*, with delivery to the customer's door as a bonus. When delivering a quart of milk, the route dealer had to charge only a cent more than *Nebbia*, a most inadequate differential. . . .

The economic depression now affecting the dairy farmers of New York does not suspend the operation of the Fourteenth Amendment. . . .

The *Housing* cases, *Block v. Hirsh*, 256 U.S. 135 . . . undoubtedly went to the very limit of the police power. They were based upon a shortage of houses and a multitude of persons anxious for housing, which allowed a grasping landlord to victimize the tenant for his own profit. . . . At the opposite extreme is the statute now before this Court. With the State of New York flooded with wholesome milk, the Legislature and Milk Control Board

purport to fine and jail anyone who sells it to the public below the price set by order. . . .

The milk situation in New York is at the pole opposite to monopoly. . . . The statute and order seek arbitrarily to fix prices for this milk at a level higher than the natural abundance would indicate. Such regulation is unconstitutional, and can not stand.

Mr. Henry S. Manley, with whom *Mr. John J. Bennett, Jr.*, Attorney General of New York, and *Mr. Henry Epstein*, Solicitor General, were on the brief, for appellee.

The Milk Control Law was designed and enacted for the purpose of regulating the price of milk in the State of New York temporarily and during a serious emergency. . . .

It being accepted as a fact that a public emergency exists, and that the legislation is of a temporary nature, greater latitude than usual is permissible. *Wilson v. New*, 243 U.S. 332; *Block v. Hirsh*, 256 U.S. 135, 157. . . .

The temporary and emergent character of the legislation being accepted, it is well within the scope of the police power. . . .

See also *Barbier v. Connolly*, 113 U.S. 27; *Manigault v. Springs*, 199 U.S. 473, 480; *Sligh v. Kirkwood*, 237 U.S. 52, 59. . . .

The Legislature of New York has found the facts relative to the milk industry. The enactment itself expresses the legislative judgment as to the appropriate remedy.

The considerations which were decisive as to the ice business of Oklahoma are none of them applicable to the business of milk distribution in New York State; the legislative finding that the latter is "a business affecting the public health and interest" has abundant support; it is a business of such nature as to justify the application to it of some of the forms of regulation ordinarily applied to a public utility.

Fixing minimum prices to consumers is a common form of utility regulation. *Munn v. Illinois*, 94 U.S. 113. . . .

As seen by the Legislature through the report of its committee, New York had more milk than the available fluid markets could take (in the Spring and early Summer a double supply), nearly all produced under conditions that made it available for the fluid markets and competing for the premium to be obtained there. The distributors, down to the smallest store, carried on a brisk competition, but at the farmers' expense. Falling prices in the cities and villages, secret discounts and free milk and other price concessions, promptly were reflected in lower prices to farmers. In the four years from March 1929 to March 1933, the retail price of milk fell 37%, but the price paid to the farmers fell 61%. The dealers' margin was decreased only 17%.

All agriculture is notoriously difficult to control through the law of supply and demand. This is true for a number of reasons, not the least important being that a farm is also a home, and a farmer and his family will cling to the soil regardless of profit. Dairying is a branch of agriculture, and it is a biological industry, the "cow cycle" ordinarily being fifteen years from peak to peak. The dairy industry will destroy itself, producing below the cost of production with no more manifestation of logical control than a herd of buffalo plunging over a cliff.

Milk is an ideal disease carrier and has need to be produced for the fluid market under safeguards which cost money and which can not be maintained when the milk check is all absorbed in the feed bill. Milk is a perishable food and the presence of excess milk in a city market under ordinary conditions of human cupidity is a health menace.

The business of receiving and distributing milk requires a considerable investment of capital and its operating expenses are relatively constant per unit of sale. It is a natural monopoly of organization handling an essential commodity, and if it were compelled to accept its even share of such price reductions as those which occurred in the period 1929-1933, or were subjected to stress through the reverse condition of milk shortage, its tendency to monopoly would rapidly be realized and would be attended by various public distresses.

Primarily what the Legislature desired to accomplish was to save the dairy industry from destruction, by giving it a price for milk nearer to the cost of production. The direct approach to this problem was by setting a minimum price to be paid by distributors to producers.

Perhaps this simple approach would have been effective. The original form of the bill, which contained no provision for fixing minimum prices to be paid by consumers, evidently intended this method of approach. Somebody must have been strongly impressed by the desirability of ending the destructive competition at the place where it was being waged, and so the minimum-price-to-the-consumer provision was added. . . .

MR. JUSTICE ROBERTS delivered the opinion of the Court.

The Legislature of New York established a Milk Control Board with power, among other things, to "fix minimum and maximum retail prices to be charged by stores to consumers for consumption off the premises where sold." The Board fixed nine cents as the price to be charged by a store for a quart of milk. Nebbia, the proprietor of a grocery store in Rochester, sold two quarts and a five cent loaf of bread for eighteen cents; and was convicted for violating the Board's order. . . .

The question for decision is whether the Federal Constitution prohibits a state from so fixing the selling price of milk. We first inquire as to the occasion for the legislation and its history.

During 1932 the prices received by farmers for milk were much below the cost of production. The decline in prices during 1931 and 1932 was much greater than that of prices generally. The situation of the families of dairy producers had become desperate and called for state aid similar to that afforded the unemployed, if conditions should not improve.

* * * * *

First. The appellant urges that the order of the Milk Control Board denies him the equal protection of the laws. . . . We think the contention . . . is not well founded. For aught that appears, the appel-

lant purchased his supply of milk from a farmer as do distributors, or could have procured it from a farmer if he so desired. There is therefore no showing that the order placed him at a disadvantage, or in fact affected him adversely, and this alone is fatal to the claim of denial of equal protection. . . .

Second. The more serious question is whether, in the light of the conditions disclosed, the enforcement denied the appellant the due process secured to him by the Fourteenth Amendment.

Save the conduct of railroads, no business has been so thoroughly regimented and regulated by the State of New York as the milk industry A perusal of these statutes discloses that the milk industry has been progressively subjected to a larger measure of control. . . . The challenged amendment of 1933 carried regulation much farther than the prior enactments. Appellant insists that it went beyond the limits fixed by the Constitution.

Under our form of government the use of property and the making of contracts are normally matters of private and not of public concern. The general rule is that both shall be free of governmental interference. But neither property rights nor contract rights are absolute; for government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm. Equally fundamental with the private right is that of the public to regulate it in the common interest. . . .

The Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects state action, do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be obtained. It results that a regulation valid for one sort of business, or in given circumstances, may be invalid for another sort, or for the same business under other circumstances, because the reasonableness of each regulation depends upon the relevant facts.

* * * * *

The milk industry in New York has been the subject of long-standing and drastic regulation in the public interest. The legislative investigation of 1932 was persuasive of the fact that for this and other reasons unrestricted competition aggravated existing evils, and the normal law of supply and demand was insufficient to correct maladjustments detrimental to the community. The inquiry disclosed destructive and demoralizing competitive conditions and unfair trade practices which resulted in retail

price-cutting and reduced the income of the farmer below the cost of production. We do not understand the appellant to deny that in these circumstances the legislature might reasonably consider further regulation and control desirable for protection of the industry and the consuming public. That body believed conditions could be improved by preventing destructive price-cutting by stores which, due to the flood of surplus milk, were able to buy at much lower prices than the larger distributors and to sell without incurring the delivery costs of the latter. In the order of which complaint is made the Milk Control Board fixed a price of ten cents per quart for sales by a distributor to a consumer, and nine cents by a store to a consumer, thus recognizing the lower costs of the store, and endeavoring to establish a differential which would be just to both. In the light of the facts the order appears not to be unreasonable or arbitrary, or without relation to the purpose to prevent ruthless competition from destroying the wholesale price structure on which the farmer depends for his livelihood, and the community for an assured supply of milk.

But we are told that because the law essays to control prices it denies due process. Notwithstanding the admitted power to correct existing economic ills by appropriate regulation of business, even though an indirect result may be a restriction of the freedom of contract or a modification of charges for services or the price of commodities, the appellant urges that direct fixation of prices is a type of regulation absolutely forbidden. . . . The argument runs that the public control of rates or prices is *per se* unreasonable and unconstitutional, save as applied to businesses affected with a public interest; that a business so affected is one in which property is devoted to an enterprise of a sort which the public itself might appropriately undertake, or one whose owner relies on a public grant or franchise for the right to conduct the business, or in which he is bound to serve all who apply; in short, such as is commonly called a public utility; or a business in its nature a monopoly. The milk industry, it is said, possesses none of these characteristics, and, therefore, not being affected with a public interest, its charges may not be controlled by the state. Upon the soundness of this contention the appellant's case against the statute depends.

We may as well say at once that the dairy industry is not, in the accepted sense of the phrase, a public utility. We think the appellant is also right in asserting that there is in this case no suggestion of any monopoly or monopolistic practice. It goes without saying that those engaged in the business are in no way dependent upon public grants or franchise for the privilege of conducting their activities. But if, as must be conceded, the industry is subject to regulation in the public interest, what constitutional principle bars the state from correcting existing mal-

adjustments by legislation touching prices? We think there is no such principle. The due process clause makes no mention of sales or of prices any more than it speaks of business or contracts or buildings or other incidents of property. The thought seems nevertheless to have persisted that there is something peculiarly sacrosanct about the price one may charge for what he makes or sells, and that, however able to regulate other elements of manufacture or trade, with incidental effect upon price, the state is incapable of directly controlling the price itself. This view was negatived many years ago. *Munn v. Illinois*, 94 U.S. 113. The appellant's claim is, however, that this court, in there sustaining a statutory prescription of charges for storage by the proprietors of a grain elevator, limited permissible legislation of that type to businesses affected with a public interest, and he says no business is so affected except it have one or more of the characteristics he enumerates. But this is a misconception. *Munn* and *Scott* held no franchise from the state. They owned the property upon which their elevator was situated and conducted their business as private citizens. No doubt they felt at liberty to deal with whom they pleased and on such terms as they might deem just to themselves. Their enterprise could not fairly be called a monopoly, although it was referred to in the decision as a "virtual monopoly." This meant only that their elevator was strategically situated and that a large portion of the public found it highly inconvenient to deal with others. This court concluded the circumstances justified the legislation as an exercise of the governmental right to control the business in the public interest; that is, as an exercise of the police power. It is true that the court cited a statement from Lord Hale's *De Portibus Maris*, to the effect that when private property is "affected with a public interest, it ceases to be *juris privati* only"; but the court proceeded at once to define what it understood by the expression, saying: "Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large" (p. 126). Thus understood, "affected with a public interest" is the equivalent of "subject to the exercise of the police power"; and it is plain that nothing more was intended by the expression. . . .

In the further discussion of the principle it is said that when one devotes his property to a use, "in which the public has an interest," he in effect "grants to the public an interest in that use" and must submit to be controlled for the common good. The conclusion is that if *Munn* and *Scott* wished to avoid having their business regulated they should not have embarked their property in an industry which is subject to regulation in the public interest.

The true interpretation of the court's language is claimed to be that only property voluntarily devoted to a known public use is subject to

regulation as to rates. But obviously Munn and Scott had not voluntarily dedicated their business to a public use. They intended only to conduct it as private citizens, and they insisted that they had done nothing which gave the public an interest in their transactions or conferred any right of regulation. The statement that one has dedicated his property to a public use is, therefore, merely another way of saying that if one embarks in a business which public interest demands shall be regulated, he must know regulation will ensue. . . .

Many other decisions show that the private character of a business does not necessarily remove it from the realm of regulation of charges or prices. The usury laws fix the price which may be exacted for the use of money, although no business more essentially private in character can be imagined than that of loaning one's personal funds. *Griffith v. Connecticut*, 218 U.S. 563. Insurance agents' compensation may be regulated, though their contracts are private, because the business of insurance is considered one properly subject to public control. *O'Gorman & Young v. Hartford Fire Ins. Co.*, 282 U.S. 251. Statutes prescribing in the public interest the amounts to be charged by attorneys for prosecuting certain claims, a matter ordinarily one of personal and private nature, are not a deprivation of due process. . . . *Margolin v. United States*, 269 U.S. 93. A stockyards corporation, "while not a common carrier, nor engaged in any distinctively public employment, is doing a work in which the public has an interest," and its charges may be controlled. *Cotting v. Kansas City Stockyards Co.*, 183 U.S. 79, 85. Private contract carriers, who do not operate under a franchise, and have no monopoly of the carriage of goods or passengers, may, since they use the highways to compete with railroads, be compelled to charge rates not lower than those of public carriers for corresponding services, if the state, in pursuance of a public policy to protect the latter, so determines. *Stephenson v. Binford*, 287 U.S. 251, 274.

It is clear that there is no closed class or category of businesses affected with a public interest, and the function of courts in the application of the Fifth and Fourteenth Amendments is to determine in each case whether circumstances vindicate the challenged regulation as a reasonable exertion of governmental authority or condemn it as arbitrary or discriminatory. *Wolff Packing Co. v. Industrial Court*, 262 U.S. 522, 535. The phrase "affected with a public interest" can, in the nature of things, mean no more than that an industry, for adequate reason, is subject to control for the public good. In several of the decisions of this court wherein the expressions "affected with a public interest," and "clothed with a public use," have been brought forward as the criteria of the validity of price control, it has been admitted that they are not susceptible of definition and form an unsatisfactory test of the constitu-

tionality of legislation directed at business practices or prices. These decisions must rest, finally, upon the basis that the requirements of due process were not met because the laws were found arbitrary in their operation and effect. But there can be no doubt that upon proper occasion and by appropriate measures the state may regulate a business in any of its aspects, including the prices to be charged for the products or commodities it sells.

So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote the public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court *functus officio*. . . . And it is equally clear that if the legislative policy be to curb unrestrained and harmful competition by measures which are not arbitrary or discriminatory it does not lie with the courts to determine that the rule is unwise. With the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal. The course of decision in this court exhibits a firm adherence to these principles. Times without number we have said that the legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power.⁵

The law-making bodies have in the past endeavored to promote free competition by laws aimed at trusts and monopolies. The consequent interference with private property and freedom of contract has not availed with the courts to set these enactments aside as denying due process. Where the public interest was deemed to require the fixing of minimum prices, that expedient has been sustained.⁶

If the law-making body within its sphere of government concludes that the conditions or practices in an industry make unrestricted competition an inadequate safeguard of the consumer's interests, produce waste harmful to the public, threaten ultimately to cut off the supply of a

⁵ Roberts, J., drops this footnote: See *McLean v. Arkansas*, 211 U.S. 539, 547; *Tanner v. Little*, 240 U.S. 369, 385; *Green v. Frazier*, 253 U.S. 233, 240; *O'Gorman & Young v. Hartford Fire Ins. Co.*, 282 U.S. 251, 257-8; *Gant v. Oklahoma City*, 289 U.S. 98, 102.—Ed.

⁶ Roberts, J., refers to *Van Camp & Sons Co. v. American Can Co.*, 278 U.S. 245.—Ed.

commodity needed by the public, or portend the destruction of the industry itself, appropriate statutes passed in an honest effort to correct the threatened consequences may not be set aside because the regulation adopted fixes prices reasonably deemed by the legislature to be fair to those engaged in the industry and to the consuming public. And this is especially so where, as here, the economic maladjustment is one of price, which threatens harm to the producer at one end of the series and the consumer at the other. The Constitution does not secure to anyone liberty to conduct his business in such fashion as to inflict injury upon the public at large, or upon any substantial group of the people. Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty.

Tested by these considerations we find no basis in the due process clause of the Fourteenth Amendment for condemning the provisions of the Agriculture and Markets Law here drawn into question.

Separate opinion of MR. JUSTICE McREYNOLDS.

In fixing sale prices the Board "must take into consideration the amount necessary to yield a 'reasonable return' to the producer and the milk dealer. . . . The fixing of minimum prices is one of the main features of the act. The question is whether the act, so far as it provides for fixing minimum prices for milk, is unconstitutional . . . in that it interferes with the right of the milk dealer to carry on his business in such manner as suits his convenience without state interference as to the price at which he shall sell his milk. The power thus to regulate private business can be invoked only under special circumstances. It may be so invoked when the Legislature is dealing with a paramount industry upon which the prosperity of the entire State in large measure depends. It may not be invoked when we are dealing with an ordinary business, essentially private in its nature. This is the vital distinction pointed out in *New State Ice Co. v. Liebmann* (285 U.S. 262, 277). . . ." [*People v. Nebbia*, 262 N.Y. 259, 264.]

Our question is whether the Control Act . . . deprives him of rights guaranteed by the XIV Amendment. He was convicted of a crime for selling his own property—wholesome milk—in the ordinary course of business at a price satisfactory to himself and the customer. . . . Prices at which the producer may sell were not prescribed—he may accept any price—nor was production in any way limited. . . . There was an oversupply of an excellent article. . . .

The theory that legislative action which ordinarily would be ineffec-

tive because of conflict with the Constitution may become potent if intended to meet peculiar conditions and properly limited, was lucidly discussed and its weakness disclosed by the dissenting opinion in *Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398. . . .

What circumstances give force to an "emergency" statute? In how much of the State must they obtain? Everywhere, or will a single county suffice? How many farmers must have been impoverished or threatened violence to create a crisis of sufficient gravity? If prices for agricultural products become high can consumers claim a crisis exists and demand that the Legislature fix less ones? Or are producers alone to be considered, consumers neglected? To these questions we have no answers. How is an accused to know when some new rule of conduct arrived, when it will disappear?

The exigency is of the kind which inevitably arises when one set of men continue to produce more than all others can buy. The distressing result to the producer followed his ill-advised but voluntary efforts. Similar situations occur in almost every business. If here we have an emergency sufficient to empower the Legislature to fix sales prices, then whenever there is too much or too little of an essential thing—whether of milk or grain or pork or coal or shoes or clothes—constitutional provisions may be declared inoperative. . . .

Is the milk business so affected with public interest that the Legislature may prescribe prices for sales by stores? This Court has approved the contrary view; has emphatically declared that a State lacks power to fix prices in similar private businesses. *United States v. Cohen Grocery Co.*, 255 U.S. 81; *Adkins v. Children's Hospital*, 261 U.S. 525; *Wolff Packing Co. v. Industrial Court*, 262 U.S. 522; *Tyson & Bro. v. Banton*, 273 U.S. 418; *Fairmount Creamery Co. v. Minnesota*, 274 U.S. 1; *Ribnik v. McBride*, 277 U.S. 350; *Williams v. Standard Oil Co.*, 278 U.S. 235; *New State Ice Co. v. Liebmann*, 285 U.S. 262; *Sterling v. Constantin*, 287 U.S. 378, 396. . . .

Regulation to prevent recognized evils in business has long been upheld as permissible legislative action. But fixation of the price at which "A," engaged in an ordinary business, may sell, in order to enable "B," a producer, to improve his condition, has not been regarded as within legislative power. This is not regulation, but management, control, dictation—it amounts to the deprivation of the fundamental right which one has to conduct his own affairs honestly and along customary lines. The argument advanced here would support general prescription of prices for farm products, groceries, shoes, clothing, all the necessities of modern civilization, as well as labor, when some legislature finds and declares

such action advisable and for the public good. This Court has declared that a State may not by legislative fiat convert a private business into a public utility. *Michigan Comm'n v. Duke*, 266 U.S. 570, 577. *Frost Trucking Co. v. Railroad Comm'n*, 271 U.S. 583, 592. *Smith v. Cahoon*, 283 U.S. 553, 563. And if it be now ruled that one dedicates his property to public use whenever he embarks on an enterprise which the Legislature may think is desirable to bring under control, this is but to declare that rights guaranteed by the Constitution exist only so long as supposed public interest does not require their extinction. To adopt such a view, of course, would put an end to liberty under the Constitution.

Munn v. Illinois (1877), 94 U.S. 113, has been much discussed in the opinions referred to above. And always the conclusion was that nothing there sustains the notion that the ordinary business of dealing in commodities is charged with a public interest and subject to legislative control. The contrary has been distinctly announced. To undertake now to attribute a repudiated implication to that opinion is to affirm that it means what this Court has declared again and again was not intended. The painstaking effort there to point out that certain businesses like ferries, mills, &c. were subject to legislative control at common law and then to show that warehousing at Chicago occupied like relation to the public would have been pointless if "affected with a public interest" only means that the public has serious concern about the perpetuity and success of the undertaking. That is true of almost all business affairs. Nothing in the opinion lends support, directly or otherwise, to the notion that in times of peace a legislature may fix the price of ordinary commodities—grain, meat, milk, cotton, &c.

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But plainly, I think, this Court must have regard to the wisdom of the enactment. At least, we must inquire concerning its purpose and decide whether the means proposed have reasonable relation to something within legislative power—whether the end is legitimate, and the means appropriate. . . . Here, we find direct interference with guaranteed rights defended upon the ground that the purpose was to promote the public welfare by increasing milk prices at the farm. Unless we can affirm that the end proposed is proper and the means adopted have reasonable relation to it, this action is unjustifiable.

The court below has not definitely affirmed this necessary relation; it has not attempted to indicate how higher charge at stores to impoverished customers when the output is excessive and sale prices by producers are unrestrained, can possibly increase receipts at the farm. . . .

Not only does the statute interfere arbitrarily with the rights of the

little grocer to conduct his business according to standards long accepted—complete destruction may follow; but it takes away the liberty of twelve million consumers to buy a necessity of life in an open market. It imposes direct and arbitrary burdens upon those already seriously impoverished with the alleged immediate design of affording special benefits to others. To him with less than nine cents it says—You cannot procure a quart of milk from the grocer although he is anxious to accept what you can pay and the demands of your household are urgent! A superabundance; but no child can purchase from a willing storekeeper below the figure appointed by three men at headquarters! And this is true although the storekeeper himself may have bought from a willing producer at half that rate and must sell quickly or lose his stock through deterioration. The financial scheme is to protect the farmer against undue exactions by prescribing the price at which milk disposed of by him at will may be resold!

MR. JUSTICE VAN DEVANTER, MR. JUSTICE SUTHERLAND, and MR. JUSTICE BUTLER authorize me to say that they concur in this opinion.

The Police Power and Minimum Wages

WEST COAST HOTEL CO. v. PARRISH.

Supreme Court of the United States. 1937.
300 U.S. 379.

MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court.

This case presents the question of the constitutional validity of the minimum wage law of the State of Washington.

. . . . It provides:

"Section 1. The welfare of the State of Washington demands that women and minors be protected from conditions of labor which have a pernicious effect on their health and morals. The State of Washington, therefore, exercising herein its police and sovereign power declares that inadequate wages and unsanitary conditions of labor exert such pernicious effect.

"Sec. 2. It shall be unlawful to employ women or minors in any industry or occupation within the State of Washington under conditions of labor detrimental to their health or morals; and it shall be unlawful to employ women workers in any industry within the State of Washington at wages which are not adequate for their maintenance.

"Sec. 3. There is hereby created a commission to be known as the

'Industrial Welfare Commission' for the State of Washington, to establish such standards of wages and conditions of labor for women and minors within the State of Washington, as shall be held hereunder to be reasonable and not detrimental to health and morals, and which shall be sufficient for the decent maintenance of women." . . .

By a later Act the Industrial Welfare Commission was abolished and its duties were assigned to the Industrial Welfare Committee consisting of the Director of Labor and Industries, the Supervisor of Industrial Insurance, the Supervisor of Industrial Relations, the Industrial Statistician and the Supervisor of Women in Industry. . . .

The appellant conducts a hotel. The appellee Elsie Parrish was employed as a chambermaid and (with her husband) brought this suit to recover the difference between the wages paid her and the minimum wage fixed pursuant to the state law. The minimum wage was \$14.50 per week of 48 hours. The appellant challenged the act as repugnant to the due process clause of the Fourteenth Amendment of the Constitution of the United States. The Supreme Court of the State . . . sustained the statute. . . . The case is here on appeal.

The appellant relies upon the decision of this Court in *Adkins v. Children's Hospital*, 261 U.S. 525, which held invalid the District of Columbia Minimum Wage Act, which was attacked under the due process clause of the Fifth Amendment. . . .

The recent case of *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587, came here on certiorari to the New York court, which had held the New York minimum wage act for women to be invalid. A minority of this Court thought that the New York statute was distinguishable in a material feature from that involved in the *Adkins* case, and that for that and other reasons the New York statute should be sustained. . . . Upon that point the Court said: "The petition for the writ sought review upon the ground that this case (*Morehead*) is distinguishable from that one (*Adkins*). No application has been made for reconsideration of the constitutional question there decided. The validity of the principles upon which that decision rests is not challenged. This court confines itself to the ground upon which the writ was asked or granted. . . . He is not entitled and does not ask to be heard upon the question whether the *Adkins* case should be overruled. . . ." *Id.*, pp. 604, 605.

We think that the question which was not deemed to be open in the *Morehead* case is open and is necessarily presented here. The Supreme Court of Washington has upheld the minimum wage statute of that State. . . . The state court has refused to regard the decision in the *Adkins* case as determinative and has pointed to our decisions both before and since that case as justifying its position. We are of the opinion that this ruling of the state court demands on our part a reexamination of the

Adkins case. The importance of the question, in which many States having similar laws are concerned, the close division by which the decision in the *Adkins* case was reached, and the economic conditions which have supervened, and in the light of which the reasonableness of the exercise of the protective power of the State must be considered, make it not only appropriate, but we think imperative, that in deciding the present case the subject should receive fresh consideration.

The history of the litigation of this question may be briefly stated. The minimum wage statute of Washington was enacted over twenty-three years ago. . . . The Washington statute is essentially the same as that enacted in Oregon in the same year. The validity of the latter act was . . . affirmed here by an equally divided court, in 1917. [*Stettler v. O'Hara*,] 243 U.S. 629. The law of Oregon thus continued in effect. The District of Columbia Minimum Wage Law . . . was enacted in 1918. The statute was sustained by the Supreme Court of the District in the *Adkins* case. Upon appeal the Court of Appeals of the District first affirmed that ruling but on rehearing reversed it and the case came before this Court in 1923. The judgment of the Court of Appeals holding the Act invalid was affirmed, but with Chief Justice Taft, Mr. Justice Holmes and Mr. Justice Sanford dissenting, and Mr. Justice Brandeis taking no part. The dissenting opinions took the ground that the decision was at variance with the principles which this Court had frequently announced and applied. In 1925 and 1927, the similar minimum wage statutes of Arizona and Arkansas were held invalid upon the authority of the *Adkins* case. The Justices who had dissented in that case bowed to the ruling and Mr. Justice Brandeis dissented. *Murphy v. Sardell*, 269 U.S. 530; *Donham v. West-Nelson Co.*, 273 U.S. 657. The question did not come before us again until the last term in the *Morehead* case, as already noted. In that case, briefs supporting the New York statute were submitted by the States of Ohio, Connecticut, Illinois, Massachusetts, New Hampshire, New Jersey and Rhode Island. 298 U.S., p. 604, *note*. Throughout this entire period the Washington statute now under consideration has been in force.

The principle which must control our decision is not in doubt. The constitutional provision invoked is the due process clause of the Fourteenth Amendment governing the States, as the due process clause invoked in the *Adkins* case governed Congress. In each case the violation alleged by those attacking minimum wage regulation for women is deprivation of freedom of contract. What is this freedom? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation the Constitution does not recognize an absolute and uncontrollable liberty. . . . But the liberty safeguarded is liberty

in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.

This essential limitation of liberty in general governs freedom of contract in particular. More than twenty-five years ago we set forth the applicable principle in these words, after referring to the cases where the liberty guaranteed by the Fourteenth Amendment had been broadly described:

"But it was recognized in the cases cited, as in many others, that freedom of contract is a qualified and not an absolute right. There is no absolute freedom to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community." *Chicago, B. & Q. R. Co. v. McGuire*, 219 U.S. 549, 567.

This power under the Constitution to restrict freedom of contract has had many illustrations. That it may be exercised in the public interest with respect to contracts between employer and employee is undeniable. . . .

The point that has been strongly stressed that adult employees should be deemed competent to make their own contracts was decisively met nearly forty years ago in *Holden v. Hardy*, (169 U.S. 366), where we pointed out the inequality in the footing of the parties. . . .

And we added that the fact "that both parties are of full age and competent to contract does not necessarily deprive the State of the power to interfere where the parties do not stand upon an equality, or where the public health demands that one party to the contract shall be protected against himself." (*Id.*, 397.)

It is manifest that this established principle is peculiarly applicable in relation to the employment of women in whose protection the State has a special interest. That phase of the subject received elaborate consideration in *Muller v. Oregon* (1908), 208 U.S. 412, where the constitutional authority of the State to limit the working hours of women was sustained. . . . We emphasized the need of protecting women against oppression despite her (*sic*) possession of contractual rights. . . . Again, in *Quong Wing v. Kirkendall*, 223 U.S. 59, [we] referred to recognized classifications on the basis of sex with regard to hours of work and in other matters, and we observed that the particular points at which that difference shall be enforced by legislation were largely in the power

of the State. In later rulings this Court sustained the regulation of hours of work of women employees. . . .

This array of precedents and the principles they applied were thought by the dissenting Justices in the *Adkins* case to demand that the minimum wage statute be sustained. The validity of the distinction made by the Court between a minimum wage and a maximum of hours in limiting liberty of contract was especially challenged. 261 U.S., p. 564. That challenge persists and is without any satisfactory answer. . . .

One of the points which was pressed by the Court in supporting its ruling in the *Adkins* case was that the standard set up by the District of Columbia Act did not take appropriate account of the value of the services rendered. In the *Morehead* case, the minority thought that the New York statute had met that point in its definition of a "fair wage" and that it accordingly presented a distinguishable feature which the Court could recognize within the limits which the *Morehead* petition for certiorari was deemed to present. The Court, however, did not take that view and the New York Act was held to be essentially the same as that for the District of Columbia. The statute now before us is like the latter, but we are unable to conclude that in its minimum wage requirement the State has passed beyond the boundary of its broad protective power.

The minimum wage to be paid under the Washington statute is fixed after full consideration by representatives of employers, employees and the public. It may be assumed that the minimum wage is fixed in consideration of the services that are performed in the particular occupations under normal conditions. Provision is made for special licenses at less wages in the case of women who are incapable of full service. The statement of Mr. Justice Holmes in the *Adkins* case is pertinent: "This statute does not compel anybody to pay anything. It simply forbids employment at rates below those fixed as the minimum requirement of health and right living. It is safe to assume that women will not be employed at even the lowest wages allowed unless they earn them, or unless the employer's business can sustain the burden. In short the law in its character and operation is like hundreds of so-called police laws that have been upheld." 261 U.S., p. 570. And Chief Justice Taft forcibly pointed out the consideration which is basic in a statute of this character: "Legislatures which adopt a requirement of maximum hours or minimum wages may be presumed to believe that when sweating employers are prevented from paying unduly low wages by positive law they will continue their business, abating that part of their profits, which were wrung from the necessities of their employees, and will concede the better terms required by the law; and that while in individual cases hardship may result, the restrictions will enure to the benefit

of the general class of employees in whose interest the law is passed and so to that of the community at large." *Id.*, p. 563.

We think that the views thus expressed are sound and that the decision in the *Adkins* case was a departure from the true application of the principles governing the regulation by the State of the relation of employer and employed. . . .

With full recognition of the earnestness and vigor which characterize the prevailing opinion in the *Adkins* case, we find it impossible to reconcile that ruling with these well-considered declarations. What can be closer to the public interest than the health of women and their protection from unscrupulous and overreaching employers? And if the protection of women is a legitimate end of the exercise of state power, how can it be said that the requirement of the payment of a minimum wage fairly fixed in order to meet the very necessities of existence is not an admissible means to that end? The legislature of the State was clearly entitled to consider the situation of women in employment, the fact that they are in the class receiving the least pay, that their bargaining power is relatively weak, and that they are the ready victims of those who would take advantage of their necessitous circumstances. The legislature was entitled to adopt measures to reduce the evils of the "sweating system," the exploiting of workers at wages so low as to be insufficient to meet the bare cost of living, thus making their very helplessness the occasion of a most injurious competition. The legislature had the right to consider that its minimum wage requirements would be an important aid in carrying out its policy of protection. The adoption of similar requirements by many States evidences a deep-seated conviction both as to the presence of the evil and as to the means adapted to check it. Legislative response to that conviction cannot be regarded as arbitrary or capricious, and that is all we have to decide. Even if the wisdom of the policy be regarded as debatable and its effects uncertain, still the legislature is entitled to its judgment.

There is an additional and compelling consideration which recent economic experience has brought into a strong light. The exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenceless against the denial of a living wage is not only detrimental to their health and well being but casts a direct burden for their support upon the community. What these workers lose in wages the taxpayers are called upon to pay. The bare cost of living must be met. We may take judicial notice of the unparalleled demands for relief which arose during the recent period of depression and still continue to an alarming extent despite the degree of economic recovery which has been achieved. . . . The community is not bound to provide what is in effect a subsidy for unconscion-

able employers. The community may direct its law-making power to correct the abuse which springs from their selfish disregard of the public interest. . . .

Our conclusion is that the case of *Adkins v. Children's Hospital, supra*, should be, and is, overruled. The judgment of the Supreme Court of the State of Washington is

Affirmed.

MR. JUSTICE SUTHERLAND, dissenting.

MR. JUSTICE VAN DEVANTER, MR. JUSTICE McREYNOLDS, MR. JUSTICE BUTLER and I think the judgment of the court below should be reversed. . . .

Freedom of Speech and Assembly

BRIDGES v. CALIFORNIA.

Supreme Court of the United States. 1941.
314 U.S. 252.

MR. JUSTICE BLACK delivered the opinion of the Court.

These two cases, while growing out of different circumstances and concerning different parties, both relate to the scope of our national constitutional policy safeguarding free speech and a free press. All of the petitioners were adjudged guilty and fined for contempt of court by the Superior Court of Los Angeles County. Their conviction rested upon comments pertaining to pending litigation which were published in newspapers. . . .

I.

It is to be noted at once that we have no direction by the legislature of California that publications outside the court room which comment upon a pending case in a specified manner should be punishable. As we said in *Cantwell v. Connecticut*, 310 U.S. 296, 307-308, such a "declaration of the State's policy would weigh heavily in any challenge of the law as infringing constitutional limitations." But as we also said there, the problem is different where "the judgment is based on a common law concept of the most general and undefined nature." *Id.* 308. . . . The judgments below, therefore, do not come to us encased in the armor wrought by prior legislative deliberation. Under such circumstances, this Court has said that "it must necessarily be found, as an original

question," that the specified publications involved created "such likelihood of bringing about the substantive evil as to deprive (them) of the constitutional protection." *Gitlow v. New York*, 268 U.S. 652, 671.

How much "likelihood" is another question, "a question of proximity and degree" that cannot be completely captured in a formula. In *Schenck v. United States*, however, this Court said there must be a determination of whether or not "the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils." We recognize that this statement, however helpful, does not comprehend the whole problem. As Mr. Justice Brandeis said in his concurring opinion in *Whitney v. California*, 274 U.S. 357, 374: "This Court has not yet fixed the standard by which to determine when a danger shall be deemed clear; how remote the danger may be and yet be deemed present." . . .

Moreover, the likelihood, however great, that a substantive evil will result cannot alone justify a restriction upon freedom of speech or the press. The evil itself must be "substantial," Brandeis, J., concurring in *Whitney v. California*, *supra*, 374; it must be "serious," *id.* 376. And even the expression of "legislative preferences or beliefs" cannot transform minor matters of public inconvenience or annoyance into substantive evils of sufficient weight to warrant the curtailment of liberty of expression. *Schneider v. State*, 308 U.S. 147, 161.

What finally emerges from the "clear and present danger" cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished. Those cases do not purport to mark the furthestmost constitutional boundaries of protected expression, nor do we here. They do no more than recognize a minimum compulsion of the Bill of Rights. For the First Amendment does not speak equivocally. It prohibits any law "abridging the freedom of speech, or of the press." It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow.

II.

Before analyzing the punished utterances and the circumstances surrounding their publication, we must consider an argument which, if valid, would destroy the relevance of the foregoing discussion to this case. In brief, this argument is that the publications here in question belong to a special category marked off by history,—a category to which the criteria of constitutional immunity from punishment used where other types of utterances are concerned are not applicable. For, the argument runs, the power of judges to punish by contempt out-of-

court publications tending to obstruct the orderly and fair administration of justice in a pending case was deeply rooted in English common law at the time the Constitution was adopted. That this historical contention is dubious has been persuasively argued elsewhere. . . . In any event it need not detain us, for to assume that English common law in this field became ours is to deny the generally accepted historical belief that "one of the objects of the Revolution was to get rid of the English common law on liberty of speech and of the press." Schofield, *Freedom of the Press in the United States*, 9 Publications Amer. Sociol. Soc., 67, 76.

More specifically, it is to forget the environment in which the First Amendment was ratified. In presenting the proposals which were later embodied in the Bill of Rights, James Madison, the leader in the preparation of the First Amendment, said: ". . . The freedom of the press and rights of conscience, those choicest privileges of the people, are unguarded in the British Constitution." 1 Annals of Congress 1789-1790, 434. And Madison elsewhere wrote that "the state of the press . . . under common law, cannot . . . be the standard of its freedom in the United States." VI Writings of James Madison 1790-1802, 387.

There are no contrary implications in any part of the history of the period in which the First Amendment was framed and adopted. No purpose in ratifying the Bill of Rights was clearer than that of securing for the people of the United States much greater freedom of religion, expression, assembly, and petition than the people of Great Britain had ever enjoyed. . . .

The implications of subsequent American history confirm such a construction of the First Amendment. To be sure, it occurred no more to the people who lived in the decades following Ratification than it would to us now that the power of courts to protect themselves from disturbances and disorder in the court room by use of contempt proceedings could seriously be challenged as conflicting with constitutionally secured guarantees of liberty. In both state and federal courts, this power has been universally recognized. . . . But attempts to expand it in the post-Ratification years evoked popular reactions that bespeak a feeling of jealous solicitude for freedom of the press. . . .

. . . But state power in this field was not tested in this Court for more than a century. Not until 1925, with the decision in *Gitlow v. New York*, *supra*, . . . did this Court recognize in the Fourteenth Amendment the application to the states of the same standards of freedom of expression as, under the First Amendment, are applicable to the federal government. And this is the first time since 1925 that we have been called upon to determine the constitutionality of a state's exercise of the contempt power in this kind of situation. . . .

III.

We may appropriately begin our discussion of the judgments below by considering how much, as a practical matter, they would affect liberty of expression. . . . Since they punish utterances made during the pendency of a case, the judgments below therefore produce their restrictive results at the precise time when public interest in the matters discussed would naturally be at its height. Moreover, the ban is likely to fall not only at a crucial time but upon the most important topics of discussion. Here, for example, labor controversies were the topics of some of the publications. . . . It is therefore the controversies that command most interest that the decisions below would remove from the arena of public discussion. . . .

This unfocussed threat is, to be sure, limited in time, terminating as it does upon final disposition of the case. But this does not change its censorial quality. . . .

. . . . The substantive evil here sought to be averted has been variously described below. It appears to be double: disrespect for the judiciary; and disorderly and unfair administration of justice. The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.

The other evil feared, disorderly and unfair administration of justice, is more plausibly associated with restricting publications which touch upon pending litigation. . . . Legal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper. But we cannot start with the assumption that publications of the kind here involved actually do threaten to change the nature of legal trials, and that to preserve judicial impartiality, it is necessary for judges to have a contempt power by which they can close all channels of public expression to all matters which touch upon pending cases. We must therefore turn to the particular utterances here in question and the circumstances of their publication to determine to what extent the substantive evil of unfair administration of justice was a likely consequence, and whether the degree of likelihood was sufficient to justify summary punishment.

The Los Angeles Times Editorials. The Times-Mirror Company, publisher of the Los Angeles Times, and L. D. Hotchkiss, its managing

editor, were cited for contempt for the publication of three editorials. Both found by the trial court to be responsible for one of the editorials, the company and Hotchkiss were each fined \$100. The company alone was held responsible for the other two, and was fined \$100 more on account of one, and \$300 more on account of the other.

The \$300 fine presumably marks the most serious offense. The editorial thus distinguished was entitled "Probation for Gorillas?" After vigorously denouncing two members of a labor union who had previously been found guilty of assaulting nonunion truck drivers, it closes with the observation: "Judge A. A. Scott will make a serious mistake if he grants probation to Matthew Shannon and Kennan Holmes. This community needs the example of their assignment to the jute mill."

The basis for punishing the publication as contempt was by the trial court said to be its "inherent tendency" and by the Supreme Court its "reasonable tendency" to interfere with the orderly administration of justice in an action then before a court for consideration. But even if they were appropriate measures, we should find exaggeration in the use of those phrases to describe the facts here.

From the indications in the record of the position taken by the Los Angeles Times on labor controversies in the past, there could have been little doubt of its attitude toward the probation of Shannon and Holmes. In view of the paper's long-continued militancy in this field, it is inconceivable that any judge in Los Angeles would expect anything but adverse criticism from it in the event probation were granted. Yet such criticism after final disposition of the proceedings would clearly have been privileged. Hence, this editorial, given the most intimidating construction it will bear, did no more than threaten future adverse criticism which was reasonably to be expected anyway in the event of a lenient disposition of the pending case. To regard it, therefore, as in itself of substantial influence upon the course of justice would be to impute to judges a lack of firmness, wisdom, or honor,—which we cannot accept as a major premise. . . .

With respect to [the other two editorials], there is no divergence of conclusions among the members of this Court. We are all of the opinion that, upon any fair construction, their possible influence on the course of justice can be dismissed as negligible. . . .

The Bridges Telegram. While a motion for a new trial was pending in a case involving a dispute between an A. F. of L. and a C. I. O. union of which Bridges was an officer, he either caused to be published or acquiesced in the publication of a telegram which he had sent to the Secretary of Labor. The telegram referred to the judge's decision as "outrageous"; said that attempted enforcement of it would tie up the port of Los Angeles and involve the entire Pacific Coast; and concluded

with the announcement that the C. I. O. union did "not intend to allow state courts to override the majority vote of members in choosing its officers and representatives and to override the National Labor Relations Board."

Apparently Bridges' conviction is not rested at all upon his use of the word "outrageous." The remainder of the telegram fairly construed appears to be a statement that if the court's decree should be enforced there would be a strike. It is not claimed that such a strike would have been in violation of the terms of the decree, nor that in any other way it would have run foul of the law of California. On no construction, therefore, can the telegram be taken as a threat either by Bridges or the union to follow an illegal course of action. . . .

In looking at the reason advanced in support of the judgment of contempt, we find that here, too, the possibility of causing unfair disposition of a pending case is the major justification asserted. And here again the gist of the offense, according to the court below, is intimidation.

Let us assume that the telegram could be construed as an announcement of Bridges' intention to call a strike, something which, it is admitted, neither the general law of California nor the court's decree prohibited. With an eye on the realities of the situation, we cannot assume that Judge Schmidt was unaware of the possibility of a strike as a consequence of his decision. If he was not intimidated by the facts themselves, we do not believe that the most explicit statement of them could have sidetracked the course of justice. Again, we find exaggeration in the conclusion that the utterance even "tended" to interfere with justice. If there was electricity in the atmosphere, it was generated by the facts; the charge added by the Bridges telegram can be dismissed as negligible. The words of Mr. Justice Holmes, spoken in reference to very different facts, seem entirely applicable here: "I confess that I cannot find in all this or in the evidence in the case anything that would have affected a mind of reasonable fortitude, and still less can I find there anything that obstructed the administration of justice in any sense that I possibly can give to those words." *Toledo Newspaper Co. v. United States*, 247 U.S. at 425.

MR. JUSTICE FRANKFURTER, with whom concurred the CHIEF JUSTICE, MR. JUSTICE ROBERTS, and MR. JUSTICE BYRNES, dissenting.

Our whole history repels the view that it is an exercise of one of the civil liberties secured by the Bill of Rights for a leader of a large following or for a powerful metropolitan newspaper to attempt to overawe a judge in a matter immediately pending before him. The view of the majority deprives California of means for securing to its citizens justice

according to law—means which, since the Union was founded, have been the possession, hitherto unchallenged, of all the states. This sudden break with the uninterrupted course of constitutional history has no constitutional warrant. To find justification for such deprivation of the historic powers of the states is to misconceive the idea of freedom of thought and speech as guaranteed by the Constitution.

Deeming it more important than ever before to enforce civil liberties with a generous outlook, but deeming it no less essential for the assurance of civil liberties that the federal system founded upon the Constitution be maintained, we believe that the careful ambiguities and silences of the majority opinion call for a full exposition of the issues in these cases.

While the immediate question is that of determining the power of the courts of California to deal with attempts to coerce their judgments the consequence of the Court's ruling today is a denial to the people of the forty-eight states of a right which they have always regarded as essential for the effective exercise of the judicial process, as well as a denial to the Congress of powers which were exercised from the very beginning even by the framers of the Constitution themselves. To be sure, the majority do not in so many words hold that trial by newspapers has constitutional sanctity. But the atmosphere of their opinion and several of its phases mean that or they mean nothing. Certainly, the opinion is devoid of any frank recognition of the right of courts to deal with utterances calculated to intimidate the fair course of justice—a right which hitherto all the states have from time to time seen fit to confer upon their courts and which Congress conferred upon the federal courts in the Judiciary Act of 1789. If all that is decided today is that the majority deem the specific interferences with the administration of justice in California so tenuously related to the right of California to keep its courts free from coercion as to constitute a check upon free speech rather than upon impartial justice, it would be well to say so. Matters that involve so deeply the powers of the states, and that put to the test the professions by this Court of self-restraint in nullifying the political powers of state and nation, should not be left clouded.

We are not even vouchsafed reference to the specific provision of the Constitution which renders states powerless to insist upon trial by courts rather than trial by newspapers. So far as the Congress of the United States is concerned, we are referred to the First Amendment. That is specific. But we are here dealing with limitations upon California—with restraints upon the states. To say that the protection of freedom of speech of the First Amendment is absorbed by the Fourteenth does not say enough. Which one of the various limitations upon

state power introduced by the Fourteenth Amendment absorbs the First? Some provisions of the Fourteenth Amendment apply only to citizens and one of the petitioners here is an alien; some of its provisions apply only to natural persons, and another petitioner here is a corporation. See *Hague v. C. I. O.*, 307 U.S. 496, 514, and cases cited. Only the Due Process Clause assures constitutional protection of civil liberties to aliens and corporations. Corporations cannot claim for themselves the "liberty" which the Due Process Clause guarantees. That clause protects only their property. *Pierce v. Society of Sisters*, 268 U.S. 510, 535. The majority opinion is strangely silent in failing to avow the specific constitutional provision upon which its decision rests.

These are not academic debating points or technical niceties. Those who have gone before us have admonished us [that] "Under the guise of interpreting the Constitution we must take care that we do not import into the discussion our own personal views of what would be wise, just and fitting rules of government to be adopted by a free people and confound them with constitutional limitations." *Twining v. New Jersey*, 211 U.S. 78, 106-07. . . .

The Constitution was not conceived as a doctrinaire document, nor was the Bill of Rights intended as a collection of popular slogans. We are dealing with instruments of government. We cannot read into the Fourteenth Amendment the freedom of speech and of the press protected by the First Amendment and at the same time read out age-old means employed by states for securing the calm course of justice. . . . In fact, these liberties themselves depend upon an untrammelled judiciary whose passions are not even unconsciously aroused and whose minds are not distorted by extra-judicial considerations. . . .

The "liberty" secured by the Fourteenth Amendment summarizes the experience of history. . . . From the earliest days of the English courts, they have encountered obstructions to doing that for which they exist. . . . Exact legal scholarship has controverted much pertaining to the origin of summary proceedings for contempt. . . . But there is no doubt that, since the early eighteenth century, the power to punish for contempt for intrusions into the living process of adjudication has been an unquestioned characteristic of English courts and of the courts of this country.

The judicatures of the English-speaking world, including the courts of the United States and of the forty-eight states, have from time to time recognized and exercised the power now challenged. (For partial lists of cases, see Nelles and King, *Contempt by Publication in the United States*, 28 Col. L. Rev. 401, 525, 554; Sullivan, *Contempts by Publication*, pp. 185 *et seq.*) A declaratory formulation of the common law was written into the Judiciary Act of 1789 by Oliver Ellsworth, one

of the framers of the Constitution, later to become Chief Justice; the power was early recognized as incidental to the very existence of courts in a succession of opinions in the Court . . . ; it was expounded and supported by the great Commentaries . . . , those of Blackstone, Kent and Story. . . .

It is trifling with great issues to suggest that the question before us is whether eighteenth-century restraints upon the freedom of the press should now be revived. The question is rather whether nineteenth- and twentieth-century American institutions should be abrogated by judicial fiat. . . .

The rule of law applied in these cases by the California court forbade publications having "a reasonable tendency to interfere with the orderly administration of justice in pending actions." . . . It was urged before us that the words "reasonable tendency" had a fatal pervasiveness, and that their replacement by "clear and present danger" was required to state a constitutionally permissible rule of law. The Constitution, as we have recently had occasion to remark, is not a formulary. . . . Nor does it require displacement of an historic test by a phrase which first gained currency on March 3, 1919. *Schenck v. United States*, 249 U.S. 47. . . . The phrase itself is an expression of tendency and not of accomplishment, and the literary difference between it and "reasonable tendency" is not of constitutional dimension. . . .

We turn to the specific cases before us: . . .

"Probation for Gorillas?"; the third editorial, is a different matter. On April 22, 1938, a Los Angeles jury found two defendants guilty of assault with a deadly weapon and of a conspiracy to violate another section of the penal code. On May 2nd, the defendants applied for probation and the trial judge on the same day set June 7th as the day for disposing of this application. . . . In the Los Angeles Times for May 5th appeared the following editorial entitled "Probation for Gorillas?":

"Two members of Dave Beck's wrecking crew, entertainment committee, goon squad or gorillas, having been convicted in Superior Court of assaulting nonunion truck drivers, have asked for probation. . . .

"Sluggers for pay, like murderers for profit, are in a slightly different category from ordinary criminals. . . .

"It will teach no lesson to other thugs to put these men on good behavior for a limited time. . . . Judge A. A. Scott will make a serious mistake if he grants probation to Matthew Shannon and Kenman Holmes. This community needs the example of their assignment to the jute mill."

. . . . A powerful newspaper admonished a judge, who within a

year would have to secure popular approval if he desired continuance in office, that failure to comply with its demands would be "a serious mistake." It is too naive to suggest that the editorial was written with a feeling of impotence and an intention to utter idle words. A powerful newspaper brought its full coercive power to bear in demanding a particular sentence. If such sentence had been imposed, readers might assume that the court had been influenced in its action; if lesser punishment had been imposed, at least a portion of the community might be stirred to resentment. It cannot be denied that even a judge may be affected by such a quandary. We cannot say that the state court was out of bounds in concluding that such conduct offends the free course of justice. . . .

. . . . Harry R. Bridges challenges a judgment by the Superior Court of California fining him \$125 for contempt. He was President of the International Longshoremen's and Warehousemen's Union, an affiliate of the Committee for Industrial Organization, and also West Coast Director for the C. I. O. The I. L. W. U. was largely composed of men who had withdrawn from the International Longshoremen's Association, an affiliate of the American Federation of Labor. In the fall of 1937 the rival longshoremen's unions were struggling for control of a local in San Pedro Harbor. The officers of this local sought to transfer the allegiance of the local to I. L. W. U. Thereupon, longshoremen remaining in I. L. A. brought suit in the Superior Court of Los Angeles County against the local and its officers. On January 21, 1938, Judge Schmidt enjoined the officers from working on behalf of the I. L. W. U. and appointed a receiver to conduct the affairs of the local. . . . Judge Schmidt promptly stayed enforcement of his decree, and on January 24th the defendants in the injunction suit moved for a new trial. . . . On the same day that the motion for new trial was filed, Bridges sent the Secretary [of Labor] the following wire. . .

"This decision is outrageous considering I. L. A. has 15 members (in San Pedro) and the International Longshoremen-Warehousemen Union has 3,000. International Longshoremen-Warehousemen Union has petitioned the Labor Board for certification to represent San Pedro longshoremen. . . . Board hearing held; decision now pending. Attempted enforcement of Schmidt decision will tie up port of Los Angeles and involve entire Pacific Coast. International Longshoremen-Warehousemen Union, representing over 11,000 of the 12,000 longshoremen on the Pacific Coast, does not intend to allow state courts to override the majority vote of members in choosing its officers and representatives and to override the National Labor Relations Board."

This telegram found its way into the metropolitan newspapers of California. Bridges' responsibility for its publication is clear.

The publication of the telegram was regarded by the state supreme court as "a threat that if an attempt was made to enforce the decision, the ports of the entire Pacific Coast would be tied up" and "a direct challenge to the court that 11,000 longshoremen on the Pacific Coast would not abide by its decision." This occurred immediately after counsel had moved to set aside the judgment which was criticized, so unquestionably there was a threat to litigation obviously alive. It would be inadmissible dogmatism for us to say that in the context of the immediate case—the issues at stake, the environment in which the judge, the petitioner and the community were moving, the publication here made, at the time and in the manner it was made—this could not have dominated the mind of the judge before whom the matter was pending. Here too the state court's judgment should not be overturned.

. . . . It is said that the possibility of a strike, in case of an adverse ruling, must in any event have suggested itself to the private thoughts of a sophisticated judge. Therefore the publication of the Bridges telegram, we are told, merely gave that possibility public expression. . . . The mere fact that after an unfavorable decision men may, upon full consideration of their responsibilities as well as their rights, engage in a strike or lockout, is a poor reason for denying a state the power to protect its courts from being bludgeoned by serious threats while a discussion is hanging in the judicial balance. A vague, undetermined possibility that a decision of the court may lead to a serious manifestation of protest is one thing. The impact of a definite threat of action to prevent a decision is a wholly different matter. To deny such realities is to stultify law. . . .

THOMAS V. COLLINS.

Supreme Court of the United States. 1945.
323 U.S. 516.

MR. JUSTICE RUTLEDGE delivered the opinion of the Court.

The appeal is from a decision of the Supreme Court of Texas which denied appellant's petition for a writ of habeas corpus and remanded him to the custody of appellee, as sheriff of Travis County. . . . In so deciding the court upheld . . . appellant's commitment for contempt for violating a temporary restraining order issued by the District Court of Travis County. The order . . . restrained appellant, while in Texas, from soliciting members for . . . specified labor unions . . . without first obtaining an organizer's card as required by [law]. After the order was served, appellant addressed a mass meeting of workers and at the end of his speech asked persons present to join a union. . . .

The facts are substantially undisputed. The appellant, Thomas, is president of the International Union U. A. W. . . . and a vice president of the C. I. O. . . .

O. W. I. U. (Oil Workers Industrial Union), a C. I. O. affiliate, is the parent organization of many local unions in Texas, having its principal office in Fort Worth. One of these is Local No. 1002, . . . consisting largely of employees of the Humble Oil & Refining Company's plant at Bay Town, Texas, not far from Houston. During and prior to September, 1943, C. I. O. and O. W. I. U. were engaged in a campaign to organize the employees at this plant. . . . As part of the campaign a mass meeting was arranged for the evening of September 23. . . . Arrangements were made for Thomas to come to Texas to address it. . . .

Thomas . . . testified without contradiction that his only object in coming to Houston was to address this meeting. . . . At about 2:30 o'clock on the afternoon of Thursday, September 23, only some six hours before he was scheduled to speak, Thomas was served with the restraining order. . . .

The petition for the order shows on its face it was filed in anticipation of Thomas' scheduled speech. And the terms of the order show that it was issued in anticipation of the meeting and the speech.

Upon receiving service, Thomas consulted his attorneys and determined to go ahead with the meeting as planned. . . .

The meeting was orderly and peaceful. Thomas, in view of the unusual circumstances, had prepared a manuscript originally intended . . . to embody his entire address. He read the manuscript to the audience. It discussed, among other things, the State's effort, as Thomas conceived it, to interfere with his right to speak and closed with a general invitation to persons present not members of a labor union to join Local N. 1002. . . . But Thomas testified that he added, at the conclusion of the written speech, an oral solicitation of one Pat O'Sullivan, a nonunion man in the audience whom he previously had never seen.

After the meeting Thomas . . . was arrested. . . .

II.

The Supreme Court of Texas . . . sustained the Act as a valid exercise of the State's police power. . . . The provision, it was said, "affords only the right of one to engage in the business as a paid organizer, and not the mere right of an individual to express his views on the merits of the union." The court declared the Act "does not require a paid organizer to secure a license," but makes mandatory the issuance of the card. . . .

Accordingly, it likened the instant prohibition to various other

ones imposed by state or federal legislation upon "the right of one to operate or speak as the agent of another," including securities salesmen, insurance agents, real estate brokers, etc. And various decisions of this Court and others were thought to support the conclusion that the Act "imposes no previous general restraint upon the right of free speech. . . . It merely requires paid organizers to register with the Secretary of State before beginning to operate as such."

III.

In accordance with their different conceptions of the nature of the issues, the parties would apply different standards for determining them. Appellant relies on the rule which requires a showing of clear and present danger to sustain a restriction upon free speech or free assembly. Texas, consistently with its "business practice" theory, says the appropriate standard is that applied under the commerce clause to sustain the applications of state statutes regulating transportation. . . .

IV.

The case confronts us again with the duty our system places on this Court to say where the individual's freedom ends and the State's power begins. Choice on that border, now as always delicate, is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment. . . . That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions. And it is the character of the right, not of the limitation, which determines what standard governs the choice. . . .

For these reasons any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice. . . . It is therefore in our tradition to allow the widest room for discussion, the narrowest range for its restriction, particularly when this right is exercised in conjunction with peaceable assembly. It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable. They are cognate rights. . . .

This conjunction of liberties is not peculiar to religious activity and

institutions alone. . . . And the rights of free speech and a free press are not confined to any field of human interest.

The idea is not sound therefore that the First Amendment's safeguards are wholly inapplicable to business or economic activity. And it does not resolve where the line shall be drawn in a particular case merely to urge, as Texas does, that an organization for which the rights of free speech and free assembly are claimed is one "engaged in business activities" or that the individual who leads it in exercising these rights receives compensation for doing so. Nor, on the other hand, is the answer given, whether what is done is an exercise of those rights and the restriction a forbidden impairment, by ignoring the organization's economic function, because those interests of workingmen are involved or because they have the general liberties of the citizen, as appellant would do.

These comparisons are at once too simple, too general, and too inaccurate to be determinative. Where the line shall be placed in a particular application rests, not on such generalities, but on the concrete clash of particular interests and the community's relative evaluation both of them and of how the one will be affected by the specific restriction, the other by its absence. That judgment in the first instance is for the legislative body. But in our system where the line can constitutionally be placed presents a question this Court cannot escape answering independently, whatever the legislative judgment, in the light of our constitutional tradition. . . .

This Court has recognized that "in the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution. . . . Free discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society." *Thornhill v. Alabama*, 310 U.S. 88, 102-103; *Senn v. Tile Layers Protective Union*, 301 U.S. 468, 478. . . . The Texas court, in its disposition of the cause, did not give sufficient weight to this consideration, more particularly by its failure to take account of the blanketing effect of the prohibition's present application upon public discussion and also of the bearing of the clear and present danger test in these circumstances.

V.

. . . . Thomas went to Texas for one purpose and one only—to make the speech in question. Its whole object was publicly to proclaim the advantages of workers' organization and to persuade workmen to join

Local No. 1002 as part of a campaign for members. These also were the sole objects of the meeting. The campaign, and the meeting, were incidents of an impending election for collective bargaining agent, previously ordered by national authority pursuant to the guaranties of national law. Those guaranties include the workers' right to organize freely for collective bargaining. And this comprehends whatever may be appropriate and lawful to accomplish and maintain such organization. It included, in this case, the right to designate Local No. 1002 or any other union or agency as the employees' representative. It included their right fully and freely to discuss and be informed concerning this choice, privately or in public assembly. Necessarily correlative was the right of the union, its members and officials, whether residents or non-residents of Texas and, if the latter, whether there for a single occasion or sojourning longer, to discuss with and inform the employees concerning matters involved in their choice. . . . The occasion was clearly protected. The speech was an essential part of the occasion, unless all meaning and purpose were to be taken from it. And the invitations, both general and particular, were parts of the speech, inseparable incidents of the occasion and of all that was said or done.

That there was restriction upon Thomas' right to speak and the rights of the workers to hear what he had to say, there can be no doubt. The threat of the restraining order, backed by the power of contempt, and of arrest for crime, hung over every word. . . . The statute requires no specific formula. . . . Without such a limitation, the statute forbids any language which conveys, or reasonably could be found to convey, the meaning of invitation. . . . How one might "laud unionism," as the State and the State Supreme Court concede Thomas was free to do, yet in these circumstances not imply an invitation, is hard to conceive. This is the nub of the case, which the State fails to meet because it cannot do so. . . .

Furthermore, whether words intended and designed to fall short of invitation would miss that mark is a question both of intent and of effect. . . . In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning.

Such a distinction offers no security for free discussion. . . . The vice is not merely that invitation, in the circumstances shown here, is speech. It is also that its prohibition forbids or restrains discussion which is not or may not be invitation. . . .

VI.

. . . . How far the State can require previous identification by one who undertakes to exercise the rights secured by the First Amendment has been largely undetermined. It has arisen here chiefly, though only tangentially, in connection with license requirements involving the solicitation of funds, *Cantwell v. Connecticut*, 310 U.S. 396, and other activities upon the public streets or in public places, or house-to-house canvassing. . . . In these cases, however, the license requirements were for more than mere identification or previous registration and were held invalid because they vested discretion in the issuing authorities to censor the activity involved. Nevertheless, it was indicated by a dictum in *Cantwell v. Connecticut*, 310 U.S. 296, 306, that a statute going no further than merely to require previous identification would be sustained in respect to the activities mentioned. Although those activities are not involved in this case, that dictum and the decision in *Bryant v. Zimmerman*, 278 U.S. 63, furnish perhaps the instances of pronouncement or decision here nearest this phase of the question now presented.

As a matter of principle a requirement of registration in order to make a public speech would seem generally incompatible with an exercise of the rights of free speech and free assembly. Lawful public assemblies, involving no element of grave and immediate danger to an interest the State is entitled to protect, are not instruments of harm which require previous identification of the speakers. . . .

We think the controlling principle is stated in *De Jonge v. Oregon*, 299 U.S. 353, 365. In that case this Court held that, "The question, if the rights of free speech and peaceable assembly are to be preserved, is not as to the auspices under which the meeting is held but as to its purpose; not as to the relations of the speakers, but whether their utterances transcend the bounds of the freedoms of speech which the Constitution protects. . . ."

Once the speaker goes further, however, and engages in conduct which amounts to more than the right of free discussion comprehends, as when he undertakes the collection of funds or securing subscriptions, he enters a realm where a reasonable registration or identification requirement may be imposed. . . . That, however, must be done, and the restriction applied, in such a manner as not to intrude upon the rights of free speech and free assembly. In this case the separation was not maintained. If what Thomas did, in soliciting Pat O'Sullivan, was subject to such a restriction, as to which we express no opinion, that act was intertwined with the speech and the general invitation in the penalty

which was imposed for violating the restraining order. Since the penalty must be taken to have rested as much on the speech and the general invitation as on the specific one, and the former clearly were immune, the judgment cannot stand. . . .

MR. JUSTICE DOUGLAS, concurring. . . .

But once he uses the economic power which he has over other men and their jobs to influence their action, he is doing more than exercising the freedom of speech protected by the First Amendment. That is true whether he be an employer or an employee. . . .

MR. JUSTICE BLACK and MR. JUSTICE MURPHY join in this opinion.

MR. JUSTICE JACKSON, concurring. . . .

MR. JUSTICE ROBERTS (dissenting:). . . .

Not until today has it been questioned that there was any clash between this right to think one's thoughts and to express them and the right of people to be protected in their dealings with those who hold themselves out in some professional capacity by requiring registration of those who profess to pursue such callings. Doctors and nurses, lawyers and notaries, bankers and accountants, insurance agents and solicitors of every kind in every State of this Union have traditionally been under duty to make some identification of themselves as practitioners of their calling. The question before us is as to the power of Texas to call for such registration within limits precisely defined by the Supreme Court of that State in sustaining the statute now challenged. . . .

The record discloses that Texas, in the exercise of her police power, has adopted a statute regulating labor unions. The constitutional validity of but a single section is drawn in question. That section requires every "labor union organizer" to request, in writing, of the Secretary of State an "organizer's card," before soliciting members for his organization, and to give his name, his union affiliation, and his union credentials. The Secretary is then to issue him a card showing his name and affiliation and is to bear the designation "labor organizer." It is made the duty of the organizer to carry the card and, on request, to exhibit it to any person he solicits.

The Act makes violation the basis of criminal prosecution and authorizes injunctions to prevent threatened disregard of its provisions. In this instance there is before us only the validity of an injunction and the sanction imposed for refusal to obey it.

As always, it is important to reach the precise question presented. One path to this end is to note what is not involved.

First, no point is made of the circumstance that the appellant's proposed activity was enjoined in advance. Counsel at our bar asserted the constitutional vice lay in the prohibition of the statute. . . .

Secondly, the appellant does not contend that he was other than a "labor organizer" within the meaning of the Act. . . . He might well have questioned the application of the law to him . . . but he refrained, obviously because he wished to test the Act's validity and so, in effect, stipulated that its sweep included him, and his conduct on the occasion in question.

Thirdly, the appellant does not contend that, in attempting to identify solicitors and preclude solicitation without identification, the statute either in terms, or as construed and applied, reaches over into the realm of public assembly, of public speaking. . . . In his address . . . he was at pains to state that he then and there solicited members of the audience to join a named union; and to make assurance of violation doubly sure, he solicited a man by name and offered him a membership card, which the man then and there signed.

Fourthly, the Act and the injunction which he disobeyed say nothing of speech; they are aimed at a transaction,—that of solicitation of members for a union. This, and this only, is the statutory object which is said to render it unconstitutional.

We are now in a position accurately to state the appellant's contention. He asserts that, under the Constitutional guarantees, there is a sharp distinction between business rights and civil rights; that in *discussion* of labor problems, and equally in *solicitation* of union membership, civil rights are exercised; that labor organizations are the only effective means whereby employes may exercise the guaranteed civil rights, and that, consequently, *any* interference with the right to solicit membership in such organizations is a prohibited abridgment of these rights, even though the Act applies only to paid organizers. . . .

Stripped to its bare bones, this argument is that labor organizations are beneficial and lawful; . . . that freedom to solicit for them is a liberty of speech protected against state action by the Fourteenth Amendment and the National Labor Relations Act, and hence Texas cannot require a paid solicitor to identify himself. I think this is the issue and the only issue presented to the courts below and decided by them, and the only one raised here. The opinion of the court imports into the case elements on which counsel for appellant did not rely; elements which in fact counsel strove to eliminate in order to come at the fundamental challenge to any requirement of identification of a labor organizer.

The position taken in the court's opinion that in some way the statute interferes with the right to address a meeting, to speak in favor of a labor union, to persuade one's fellows to join a union, or that at least its application in this case does, or may, accomplish that end is, in my judgment, without support in the record.

We must bear in mind that the appellant himself was persuaded that merely to make the speech he had come to Texas to deliver would not violate the Act, and that he, therefore, determined, in order to preclude all doubt as to violation, to solicit those present to join the union. And, for the same purpose, he further specifically solicited an individual. . . .

Since its requirements are not obviously burdensome, we cannot void the statute as an unnecessary or excessive exercise of the State's police power on any *a priori* reasoning. . . . In the absence of a showing against the need for the statute this court ought not incontinently to reject the State's considered views of policy. . . .

It is suggested that the Act is to be distinguished from legislation regulating the use of the streets or the solicitation of money. As respects the former, I think our decision in *Cox v. New Hampshire*, 312 U.S. 569 . . . indistinguishable in principle, and the court below properly so held. If one disseminating news for his own profit may rightfully be required to identify himself, so may one who, for profit, solicits persons to join an organization.

As respects to the second, I see no reason to limit what was said in *Cantwell v. Connecticut*, 310 U.S. 296, 305, to money. The solicitation at which the Texas Act is aimed may or may not involve the payment of initiation fees or dues to the solicitor. But, in any case, it involves the assumption of business and financial liability by him who is persuaded to join a union. The transaction is in essence a business one. . . . Other paid organizers, whether for business or for charity, could be required to identify themselves. There is no reason why labor organizers should not do likewise. . . .

We may deem the statutory provision under review unnecessary or unwise, but it is not our function as judges to read our views of policy into a Constitutional guarantee, in order to overthrow a state policy we do not personally approve, by denominating that policy a violation of the liberty of speech. . . .

THE CHIEF JUSTICE, MR. JUSTICE REED, and MR. JUSTICE FRANKFURTER join in this opinion.

SENN *v.* TILE LAYERS PROTECTIVE UNION.

Supreme Court of the United States. 1937.
310 U.S. 468.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

On December 28, 1935, Senn brought this suit in the Circuit Court of Milwaukee County, against Tile Layers Protective Union, Local No. 5, Tile Layers Helpers Union, Local No. 47, and their business agents, seeking an injunction to restrain picketing, and particularly "publishing, stating or proclaiming that the plaintiff is unfair to organizer labor or to the defendant unions";

Senn was engaged at Milwaukee in the tile contracting business under the name of "Paul Senn & Co., Tile Contracting." His business was a small one, conducted, in the main, from his residence, with a showroom elsewhere. He employed one or two journeymen tile layers and one or two helpers, depending upon the amount of work he had contracted to do at the time. But, working with his own hands with tools of the trade, he performed personally on the jobs much work of a character commonly done by a tile layer or a helper. Neither Senn, nor any of his employees, was at the time this suit was begun a member of either union, and neither had any contractual relations with them. Indeed, Senn could not become a member of the tile layers union, since its constitution and rules require, among other things, that a journeyman tile setter shall have acquired his practical experience through an apprenticeship of not less than three years, and Senn had not served such an apprenticeship.

For some years the tile laying industry had been in a demoralized state because of lack of building operations; and members of the union had been in competition with non-union tile layers in their effort to secure work. . . . The wages paid by the union contractors had for some time been higher than those paid by Senn to his employees.

Because of the peculiar composition of the industry, . . . the unions had found it necessary . . . to require all employers agreeing to conduct a union shop to assent to the following provision:

"Article III. It is definitely understood that no individual . . . engaged in the Tile Contracting Business shall work with the tools . . . but that the installation of all materials shall be done by journey-men members of Tile Layers Protective Union Local No. 5."

The unions endeavored to induce Senn to become a union contractor. . . . Senn expressed a willingness to execute the agreement provided

Article III was eliminated. The union declared that this was impossible; that the inclusion of the provision was essential to the unions' interest in maintaining wage standards and spreading work among their members; and, moreover, that to eliminate Article III from the contract with Senn would discriminate against existing union contractors. . . . As the unions declared its elimination impossible, Senn refused to sign the agreement and unionize his shop. Because of his refusal, the unions picketed his place of business. The picketing was peaceful, without violence, and without any unlawful act. The evidence was that the pickets carried one banner with the inscription "P. Senn Tile Company is unfair to the Tile Layers Protective Union," another with the inscription "Let the Union tile layer install your tile work." . . .

First. . . . Whether the statute as construed and applied violates the Fourteenth Amendment presents issues never expressly passed upon by this Court. . . .

Second. The hearings below were concerned mainly with questions of state law. . . . The courts ruled that the controversy was a "labor dispute"; and that the acts done by the defendant were among those declared "lawful." . . . The question for our decision is whether the statute . . . took Senn's liberty or property or denied him equal protection of the laws in violation of the Fourteenth Amendment. Senn does not claim broadly that the Federal Constitution prohibits a State [Wisconsin] from authorizing publicity and peaceful picketing. His claim of invalidity is rested on the fact that he refused to unionize his shop solely because the union insisted upon the retention of Article III. He contends that the right to work in his business with his own hands is a right guaranteed by the Fourteenth Amendment and that the State may not authorize unions to employ publicity and picketing to induce him to refrain from exercising it.

The unions concede that Senn, so long as he conducts a nonunion shop, has the right to work with his hands and tools. . . . But the unions contend that, since Senn's exercise of the right to do so is harmful to the interests of their members, they may seek by legal means to induce him to agree to unionize his shop. . . .

Third. Clearly the means which the statute authorizes—picketing and publicity—are not prohibited by the Fourteenth Amendment. Members of a union might, without special statutory authorization by a State, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution. The State may, in the exercise of its police power, regulate the methods and means of publicity as well as the use of public streets. . . . The Legislature of Wisconsin has declared that "peaceful picketing and patrolling" on the public streets and places shall be permissible . . . provided this is done "without intimidation

or coercion" and free from "fraud, violence, breach of the peace or threat thereof." It authorizes giving publicity to the existence of the dispute "whether by advertising, patrolling any public streets or places where any person or persons may lawfully be"; but precludes misrepresentation of the facts of the controversy. And it declares that "nothing herein shall be construed to legalize a secondary boycott." See *Duplex Printing Co. v. Deering*, 254 U.S. 443, 466. Inherently, the means authorized are clearly unobjectionable. . . .

The state courts found that the unions observed the limitations prescribed by the statute. . . . Compare *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184, 207. . . . Moreover, it was confessedly open to Senn to disclose the facts in such manner and in such detail as he deemed desirable, and on the strength of the facts to seek the patronage of the public.

Truax v. Corrigan, 257 U.S. 312, is not applicable. The statute there in question was deemed to have been applied to legalize conduct which was not simply peaceful picketing. . . . It consisted of libelous attacks and abusive epithets against the employer and his friends; libelous and disparaging statements against the plaintiff's business; threats and intimidation directed against customers and employees. . . .

Fourth. The end sought by the unions is not unconstitutional. Article III, was found by the state courts to be not arbitrary or capricious. . . . That finding is amply supported by the evidence. . . . The sole purpose of the picketing was to acquaint the public with the facts and, by gaining its support, to induce Senn to unionize his shop. . . .

The unions acted, and had the right to act as they did, to protect the interests of their members against the harmful effect upon them of Senn's action. . . . Because his action was harmful, the fact that none of Senn's employees was a union member, or sought the union's aid, is immaterial. . . .

Fifth. Each member of the unions, as well as Senn, has the right to strive to earn his living. Senn seeks to do so through exercise of his individual skill and planning. The union members seek to do so through combination. Earning a living is dependent upon securing work; and securing work is dependent upon public favor. To win the patronage of the public each may strive by legal means. . . .

MR. JUSTICE BUTLER, dissenting.

Plaintiff is a tile layer and has long been accustomed to work as a helper and mechanic in that trade. The question presented is whether the State may by statute make it lawful for labor unions to adopt measures calculated to prevent him from obtaining that work. . . .

The president of Local No. 5 testified that, if plaintiff did not sign the contract, it would do everything "to harass and put things in his way"; that it intended to announce to the world that he is a non-union contractor and on that account should not be patronized, to picket his place of business, to ascertain where he had jobs and to picket them and in that way bring pressure to bear upon him to become a union contractor. . . .

The clauses of the Fourteenth Amendment invoked by plaintiff are: "No State shall . . . deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Our decisions have made it everywhere known that these provisions forbid state action which would take from the individual the right to engage in common occupations of life. . . .

"While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration. . . . Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life. . . ." *Meyer v. Nebraska*, 262 U.S. 390, 399.

"The right to follow any of the common occupations of life is an inalienable right." . . . Concurring opinion of Mr. Justice Bradley in *Butchers' Union Co. v. Crescent City Co.*, 111 U.S. 746, 762, approvingly quoted in *Allgeyer v. Louisiana*, 165 U.S. 578, 589.

"Included in the right of personal liberty and the right of private property—partaking of the nature of each—is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment by which labor and other services are exchanged for money. . . . If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long-established constitutional sense." . . . *Coppage v. Kansas*, 236 U.S. 1, 14.

"It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the amendment to secure." *Truax v. Raich*, 239 U.S. 33, 41.

"Under that amendment, nothing is more clearly settled than that it is beyond the power of a state . . . arbitrarily (to) interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 278. . . .

"For, the very idea that one man may be compelled to hold his life, or the means of living, . . . at the mere will of another, seems to be intolerable in any country where freedom prevails. . . ." *Yick Wo v. Hopkins*, 118 U.S. 356, 370. . . .

It may be assumed that the picketing . . . lawfully might be em-

ployed in a controversy between employer and employees for the purpose of persuading the employer to increase pay, etc., and dissuading non-union workers from displacing union members. The right of workers, parties to a labor dispute, to strike and picket peacefully to better their condition does not infringe any right of the employer. . . . But strikes or peaceful picketing for unlawful purposes are beyond any lawful sanction. The object being unlawful, the means and end are condemned. . . .

The object that defendants seek to attain is an unlawful one.

Admittedly, it is to compel plaintiff to quit work as helper or tile layer. Their purpose is not to establish on his jobs better wages, hours, or conditions. If permitted, plaintiff would employ union men and adhere to union requirements as to pay and hours. But, solely because he works, the unions refuse to allow him to unionize and carry on his business. . . . Adhering to the thought that there is not enough work to go around, unquestionably the union purpose is to eliminate him from all tile laying work. . . .

The principles governing competition between rival individuals seeking contracts or opportunity to work as journeymen cannot reasonably be applied in this case. Neither the union nor its members take tile laying contracts. Their interests are confined to employment of helpers and layers, their wages, hours of service, etc. The contest is not between unionized and other contractors or between one employer and another. The immediate issue is between the unions and plaintiff in respect of his right to work in the performance of his own jobs. If as to that they shall succeed, then will come the enforcement of their rules which make him ineligible to work as a journeyman. It cannot be said that, if he should be prevented from laboring as helper or layer, the work for union men to do would be increased. The unions exclude their members from jobs taken by non-union employers. About half the contractors are not unionized. More than 60 per cent of the tile layers are non-union men. . . . Between union members and plaintiff there is no immediate or direct competition. . . . The interest of the unions in the manual labor done by plaintiff is so remote, indirect and minute that they have no standing as competitors. . . . Under the circumstances here disclosed, the conduct of the unions was arbitrary and oppressive. . . .

Moreover, the picketing was unlawful because the signs used constitute a misrepresentation of the facts. One of them declared the plaintiff "unfair" to the tile layers union and, upon the basis of that statement, the other sign solicited tile work for union tile layers. . . . By the charge made, there was implied something unjust or inequitable in his attitude toward labor unions. But there was no foundation of fact for any such accusation. There was no warrant for characterizing him as

"unfair" or opposed to any legitimate purpose of the tile layers union or as unjust to union men. . . . The burden may not justly be held to be on him, by counter-picketing or other, to refute or explain the baseless charge. . . .

MR. JUSTICE VAN DEVANTER, MR. JUSTICE McREYNOLDS, and MR. JUSTICE SUTHERLAND join in this dissent.

CAFETERIA EMPLOYEES UNION, LOCAL 302, v. ANGELOS.

Supreme Court of the United States. 1943.
320 U.S. 293.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

We start with the Court of Appeals' view of the facts. . . . Petitioners, a labor union and its president, picketed a cafeteria in an attempt to organize it. The cafeteria was owned by the respondents, who themselves conducted the business without the aid of any employees. Picketing was carried on by a parade of one person at a time in front of the premises. The successive pickets were "at all times orderly and peaceful." They carried signs which tended to give the impression that the respondents were "unfair" to organized labor and that the pickets had been previously employed in the cafeteria. These representations were treated by the court below as knowingly false in that there had been no employees in the cafeteria and the respondents were "not unfair to organized labor." It also found that the pickets told prospective customers that the cafeteria served bad food, and that by "patronizing" it "they were aiding the cause of Fascism." . . .

In *Senn v. Tile Layers Union*, 301 U.S. 468, this Court ruled that members of a union might, "without special statutory authorization by a State, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Constitution." 301 U.S. at 478. Later cases applied the *Senn* doctrine by enforcing the right of workers to state their case and to appeal for public support in an orderly and peaceful manner regardless of the area of immunity as defined by state policy. *A.F. of L. v. Swing*, 312 U.S. 321; *Bakery Drivers Union Local v. Wobl*, 315 U.S. 769. To be sure, the *Senn* case related to the employment of "peaceful picketing and truthful publicity." 301 U.S. at 482. That the picketing under review was peaceful is not questioned. And to use loose language or undefined slogans that are part of the conventional give-and-take in our economic and political controversies—like "unfair" or "fascist"—is not to falsify facts. In a setting like the present, continuing representations

unquestionably false and acts of coercion going beyond the mere influence exerted by the fact of picketing, are of course not constitutional prerogatives. But here we have no attempt by the state through its courts to restrict conduct justifiably found to be an abusive exercise of the right to picket. We have before us a prohibition as unrestricted as that which we found to transgress state power in *A. F. of L. v. Swing*, *supra*. The Court here, as in the *Swing* case, was probably led into error by assuming that if a controversy does not come within the scope of state legislation limiting the issue of injunctions, efforts to make known one side of an industrial controversy by peaceful means may be enjoined. But, as we have heretofore decided, a state cannot exclude working men in a particular industry from putting their case to the public in a peaceful way "by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him." *A. F. of L. v. Swing*, 312 U.S. at 326.

The present situation is thus wholly outside the scope of the decision in *Milk Wagon Drivers Union v. Meadowmoor Co.*, 312 U.S. 287. There we sustained the equity power of a state because the record disclosed abuses deemed not episodic and isolated but of the very texture and process of the enjoined picketing. But we also made clear "that the power to deny what otherwise would be lawful picketing derives from the power of the states to prevent future coercion. Right of free speech in the future cannot be forfeited because of dissociated acts of past violence." 312 U.S. at 296. . . .

CHAPTER XIII

The New Deal and National Power

THE PROGRAM OF THE NEW DEAL

As one surveys the first five years of the New Deal—the period during which all the great legislation was put on record—the policy of the President seems pointed to the attainment of three objectives: (1) an industrial economy under governmental regulation and control so as to free it as much as possible from those maladjustments which, it was held, had produced the depression; (2) the restoration of the purchasing power of the mass of the people so as to revive the productivity of industry and business; and (3) the achievement on a broad scale of social security by means of taxation, insurance, and the entry of the government into the labor market as an employer. As the New Deal developed and took form, the leaders of organized labor took the place in governmental councils which had formerly been occupied by the leaders of Big Business, and they created a political power within the majority party which was without precedent in the history of the country. The New Deal has consequently been characterized as a pro-labor movement or coalition party, to the practical exclusion of its other objectives. It was the considered purpose of the New Deal to raise the status of organized labor at least to the level of that of the employer in terms of bargaining power. This was the point at which the whole problem of employer-employee relationships was attacked by Congress. Nevertheless, the government's labor policy fitted into the general scheme of economic rehabilitation, and, at its inception at any rate, was thought of as a part of the program for recovery.

As the new legislation came to be challenged in the courts, new issues were raised because government was penetrating fields of private enterprise hitherto innocent of governmental control. Furthermore, the interests affected were of unparalleled magnitude, so that it could be said that the consequences to the country of the Supreme Court's decisions were incalculable.¹

On March 16, 1933, only twelve days after his inauguration, President

¹ Edward S. Corwin, *Constitutional Revolution, Ltd.* (Princeton, 1941). This book contains the best account of the doctrinal struggle which the new legislation caused within the Court during the early years of the New Deal.

Roosevelt sent to Congress a bill for establishing the Agricultural Adjustment Administration. It was passed on the 12th of May following and underwent its constitutional test on January 6, 1936. The case is *United States v. Butler*, 297 U.S. 1. It was given in Chapter VII, in the section on the General Welfare. The Supreme Court struck down the statute, grounding its decision on the traditional distinction between agriculture as a local activity and commerce as an activity subsequent to, but not a part of it. A granted power might not be used to attain a prohibited end. The principle of the Child Labor Tax case, 259 U.S. 20 (1922), was applied. This case appeared in Chapter XI in the section on the Taxing Power. The liberal wing of the Court, composed of Justices Brandeis, Stone, and Cardozo, dissented through Mr. Justice Stone. He announced a principle which was later to be incorporated in the case-law of the Court: "The spending power of Congress is in addition to the legislative power and not subordinate to it."

The National Industrial Recovery Act of June 16, 1933, paralleled for industry and labor the efforts of the Administration in behalf of agriculture. For industrialists, the feature of the Act was the provision for codes of fair competition which should regulate the conduct of business. For labor, there was the now famous section 7 (a), laying down the right of employees to organize in order to bargain collectively through representatives of their own choosing. The system thus erected was already proving itself unworkable when it was invalidated by a unanimous Court in the *Schechter Case*, 295 U.S. 495 (1935). This case appears in Chapter VIII in the section on Commerce as Movement. The Court held that the primary constitutional fault in the legislation was that it undertook to regulate matters wholly within the jurisdiction of the states.

When the New Deal directed its attention to mining, it fared no better. The Bituminous Coal Conservation Act of 1935 attempted to stabilize the coal industry by fixing the price of coal at the mine and by regulating the conditions of labor in the mining of coal. The constitutional problems involved in this legislation were those posed in the *Butler* and *Schechter* cases. Indeed, the Court's opinion in *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936), which voided the Coal Act, is essentially a synthesis of the reasoning in those two cases. But, as in the case of the AAA, the dissent of the liberal wing showed that a different reading of the Constitution was possible, though it was a reading it had declined to make in the NRA case. This reading was, simply, that the commerce clause was adequate to sustain the Act because the relation between interstate commerce in coal and the intrastate price of coal at the mine was immediate and substantial. Likewise, an application of the same line of reasoning to labor conditions drew the conclusion that anarchy in the coal fields resulted in blocking the flow of coal through

the channels of interstate commerce and so brought such labor conditions within the reach of the commerce power.

The truth seems to be in retrospect that with the *Carter Coal Case* came the final statement of the old formulas by which the Court had outlined and developed the national power through the commerce clause. The jurisprudence within which these formularies were enshrined had been developed by means of concepts of governmental power and of governmental function which were profoundly different from those which animated the New Deal and which were receiving now overwhelming public support.

The Supreme Court was thus clearly confronted, and in 1937 confronted beyond equivocation, with the choice of continuing to apply the received doctrine, with its consequent frustration of federal policy, or of finding new concepts by which the program of the New Deal would be brought within the Constitution. The Court took the second choice in the great case of *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). This case and those decided with it sustained the constitutionality of the National Labor Relations Act of 1935. This statute was the reenactment in perfected form of section 7 (a) of the old NIRA. It undertook the achievement of another of the major purposes of the New Deal, the overhauling of the employer-employee relationship. It was undisguised class legislation as distinguished from special-interest legislation, for it imposed only duties on the employer and gave only rights to the employee.

What was said of this case in the chapter on interstate commerce may be recapitulated here. The development of the commerce clause had gone as far as it could go under the two conceptions of commerce as transportation and commerce as trade. The next phase or form of its development was due to the impetus of governmental protection of labor relations with industrial management. The precise point at which this protection was first exerted was in the field of collective bargaining. For Congress to enter here, it must cross the line which had up to this time separated interstate commerce on the one hand from manufacture and production on the other—the line which had been drawn in 1895 by the decision in the *E. C. Knight Case*, 156 U.S. 1, which appears in Chapter IX, and which had been strongly reaffirmed by the Court in *Hammer v. Dagenhart*, 274 U.S. 251 (1918). The Supreme Court, however, was able to accommodate this act without noticing either case. It did so by announcing a new principle, that of substantial relationship between those engaged in production, and the shipment of goods. The rationalization of the new conception had already been indicated. It had appeared in the opinion of Mr. Justice Roberts, speaking for the Court in the *Nebbia Case* (given in the preceding chapter) and in the dissenting opinion of Mr. Justice Cardozo

in the *Carter Coal Co. Case*. With this approach the Court had little difficulty in holding that whatever local activity is engaged in furthering production for goods later to be channeled into interstate commerce is itself a part of that commerce.

At this point, two steps had been taken in the formulation of the new doctrine. The *Nebbia Case* had discarded the old doctrine of business affected with a public interest. It had done so by holding that any business in which the public is interested is affected with a public interest. The doctrine in question was a hoary one. It had been announced first for use within the state jurisdictions in *Munn v. Illinois*, 94 U.S. 113, in 1876. It had been taken over into the federal jurisdiction and, so to speak, codified, in *Stafford v. Wallace*, 258 U.S. 495, and in *Chicago Board of Trade v. Olsen*, 262 U.S. 1, both decided in 1922. The *Munn Case* is given in the second section of Chapter V; the other two are in the last section of Chapter VIII. It had been used as a test which governmental power had to meet when it essayed to regulate the activities of private enterprise. That test was now laid to one side. The second step was taken with the *Jones & Laughlin Steel Case*. With that decision, labor in an industry engaged in interstate commerce became a part of that commerce, though the same labor, when viewed separately, was local in character.

In *Santa Cruz Fruit Packing Co. v. National Labor Relations Board*, 303 U.S. 453 (1938), the Court reaffirmed the doctrine of the *Steel case* with the ruling that the "close and intimate effect which brings the subject within reach of the federal power may be due to activities in relation to productive industry, although that industry when separately viewed is local." The Court's opinion actually broadens the scope of the doctrine in the latter case, for the Santa Cruz Company was in fact a manufacturing company, and shipped only 37 per cent. of its product in interstate commerce. With this decision, moreover, the court took a third step in the forging of the new commerce power: it eliminated the distinction between a direct and an indirect burden on interstate commerce. With these cases the substance of the new doctrine is complete save for refinements to be added as occasion should demand. The frontiers of Congressional power were pushed forward to include backshop employees in *Virginia Railway Co. v. System Federation No. 40*, 300 U.S. 515 (1937), and to include night watchmen in *Armour & Co. v. Wantock*, 323 U.S. 126 (1944). The *Railway case* is given in Chapter X in the section on the labor unions; the latter case appears in the present chapter.

While the scope of the new commerce power was thus adequately defined, one more step needed to be taken: the reversal of *Hammer v. Dagenhart*. It not only cut squarely across the recent cases, but it was out of line with the Court's position in most of the traditional leading cases. This the Court did with its decision in *United States v. Darby*

Lumber Co., 312 U.S. 100 (1941). The case appears at the end of Chapter XI. It might properly have been included in the present group of cases; but since the issue which the Court had to decide turned on the extent of the Congressional power to close the channels of interstate commerce, it seemed appropriate to include it with the cases on the federal police power.

The Social Security Act of August 14, 1935, was the progenitor of the New Deal reforms in this field. The statute came before the Supreme Court for the first time in the *Steward Machine Co. Case*, given below. The effect of the reasoning of Mr. Justice Cardozo (who spoke for the Court) is to settle the question, hitherto moot, as to whether Congress possesses an independent power to spend or to appropriate public funds to promote the general welfare.² "It is too late today for the argument to be heard with tolerance that in a crisis so extreme the use of the moneys of the nation to relieve the unemployed and their dependents is a use for any purpose narrower than the promotion of the public welfare. . . . The *parens patriae* has many reasons—fiscal and economic as well as social and moral—for planning to mitigate disasters that bring these burdens in their train." The power being established, two questions are to be answered: Does need exist? And, if so, Has "the expedient adopted" to satisfy this need "overlept the bounds of power"? These questions indicate that there are limits to be drawn around the scope of the spending power, even if that power is a substantive one; but they indicate that such limits are those which inhere in the constitutional system and which apply also to the other great express powers. Of course, as with other great statements of principle, clarification must wait for subsequent decisions.

The principle here is lighted by the case of *Cincinnati Soap Co. v. United States*, decided earlier in the same term. In issue was a processing tax on Philippine cocoanut oil, the proceeds of the tax being allocated to the Philippine treasury. Mr. Justice Sutherland, of the conservative wing of the Court and speaking for the Court, said that "if the tax, *qua tax*, be good, as we hold it is, and the purpose specified be one which would sustain a subsequent and separate appropriation made out of the general funds of the Treasury, neither is made invalid by being bound to the other in the same act of legislation."

The student will observe that the Tenth Amendment is invoked to challenge much of the legislation providing social security. All that needs to be said here, however, is that its availability against the federal power was all but destroyed by Mr. Justice Stone's dictum in the *Darby*

² Fifteen years before this decision, E. S. Corwin argued that the spending power of Congress is unlimited: "Spending Power of Congress," 36 *Harv. Law Rev.* 548 (1923).

Lumber Co. case, that the Amendment does no more than to state "a truism that all is retained which has not been surrendered." Although this remark was made in an opinion construing the commerce clause, the philosophy of the cases in that line has been formed independently of it. It is always difficult to apply the Tenth Amendment because its terms do not lend themselves to a particular application. Its effectiveness, consequently, is most likely to be available in settling questions of power where definition is wanting, such as in the field of social security.

After the *Butler* decision, the New Deal salvaged what it could of its agricultural policy by shifting to a program of grants in aid of soil conservation and the limitation of the production of crops. From the point of view of the constitutional issues involved, the chief enactments incorporating this policy were the Agricultural Marketing Agreement Act of August 24, 1937, and the Agricultural Adjustment Act of February 16, 1938. The first of these was sustained in the *Rock Royal* case, and the second in *Mulford v. Smith*; both are given below. Both decisions rest on the new commerce power, and call for no additional comment here.

Labor and Management and Collective Bargaining

NATIONAL LABOR RELATIONS BOARD *v.* JONES & LAUGHLIN STEEL CORP.

Supreme Court of the United States. 1937.

301 U.S. 1.

MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court.

In a proceeding under the National Labor Relation Act of 1935, (49 Stat. 449), the National Labor Relations Board found that the respondent, Jones & Laughlin Steel Corporation, had violated the Act by engaging in unfair labor practices affecting commerce. The proceeding was instituted by the Beaver Valley Lodge No. 200, affiliated with the Amalgamated Association of Iron, Steel and Tin Workers of America, a labor organization. The unfair labor practices charged were that the corporation was discriminating against members of the union with regard to hire and tenure of employment, and was coercing and intimidating its employees in order to interfere with their self-organization. The discriminatory and coercive action alleged was the discharge of certain employees.

The National Labor Relations Board, sustaining the charge, ordered the corporation to cease and desist from such discrimination and coercion, to offer reinstatement to ten of the employees named, to make good their losses in pay, and to post for thirty days notices that the corporation would not discharge or discriminate against members, or those desiring

to become members, of the labor union. As the corporation failed to comply, the Board petitioned the Circuit Court of Appeals to enforce the order. The court denied the petition, holding that the order lay beyond the range of federal power. . . . We granted certiorari.

The scheme of the National Labor Relations Act—which is too long to be quoted in full—may be briefly stated. The first section sets forth findings with respect to the injury to commerce resulting from the denial by employers of the right of employees to organize and from the refusal of employers to accept the procedure of collective bargaining. There follows a declaration that it is the policy of the United States to eliminate these causes of obstruction to the free flow of commerce. The Act then defines the terms it uses, including the terms “commerce” and “affecting commerce.” # 2. It creates the National Labor Relations Board and prescribes its organization. . . . # 7. It defines “unfair labor practices.” # 8. It lays down rules as to the representation of employees for the purpose of collective bargaining. # 9. . . . The findings of the Board as to the facts, if supported by evidence, are to be conclusive. If either party on application to the court [petitioned by the Board to enforce its orders] shows that additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearings before the Board, the court may order the additional evidence to be taken. Any person aggrieved by a final order of the Board may obtain a review in the designated courts. . . . # 10. The Board has broad powers of investigation. . . .

Contesting the ruling of the Board, the respondent argues (1) that the Act is in reality a regulation of labor relations and not of interstate commerce; (2) that the Act can have no application to the respondent's relations with its production employees because they are not subject to regulation by the federal government; and (3) that the provisions of the Act violate # 2 of Article III and the Fifth and Seventh Amendments of the Constitution of the United States.

The facts as to the nature and scope of the business of the Jones & Laughlin Steel Corporation have been found by the Labor Board and, so far as they are essential to the determination of this controversy, they are not in dispute. The Labor Board has found: The corporation . . . manufactures and distributes a widely diversified line of steel and pig iron, being the fourth largest producer of steel in the United States. With its subsidiaries—nineteen in number—it is a completely integrated enterprise, owning and operating ore, coal and limestone properties, lake and river transportation facilities and terminal railroads located at its manufacturing plants. . . . Much of its product is shipped to its warehouses in Chicago, Detroit, Cincinnati and Memphis,—to the last two places by means of its own barges and transportation equipment. In Long

Island City, New York, and in New Orleans it operates structural steel fabricating shops in connection with the warehousing of semi-finished materials sent from its works. Through one of its wholly-owned subsidiaries it owns, leases and operates stores, warehouses and yards for the distribution of equipment and supplies for drilling and operating oil and gas wells and for pipe lines, refineries and pumping stations. It has sales offices in twenty cities in the United States and a wholly-owned subsidiary which is devoted exclusively to distributing its product in Canada. Approximately 75 per cent of its product is shipped out of Pennsylvania.

Summarizing these operations, the Labor Board concluded that the works in Pittsburgh and Aliquippa "might be likened to the heart of a self-contained, highly integrated body. They draw in the raw materials from Michigan, Minnesota, West Virginia, Pennsylvania in part through arteries and by means controlled by the respondent; they transform the materials and then pump them out to all parts of the nation through the vast mechanism which the respondent has elaborated."

Respondent points to evidence that the Aliquippa plant, in which the discharged men were employed, contains complete facilities for the production of finished and semi-finished iron and steel products from raw materials. . . . Respondent's operations at these works are carried on in two distinct stages, the first being the conversion of raw materials into pig iron and the second being the manufacture of semi-finished and finished iron and steel products; and in both cases the operations result in substantially changing the character, utility and value of the materials wrought upon. . . . Respondent also directs attention to the fact that the iron ore is stored in stock piles for future use, the amount of ore in storage varying with the season but usually being enough to maintain operations from nine to ten months; that the coal is there, like ore, stored for future use, approximately two or three months' supply of coal being always on hand; and that the limestone is also stored in amounts usually adequate to run the blast furnaces for a few weeks. . . .

Practically all the factual evidence in the case, except that which dealt with the nature of the respondent's business, concerned its relations with the employees in the Aliquippa plant whose discharge was the subject of the complaint. These employees were active leaders in the labor union. Several were officers and others were leaders of particular groups. Two of the employees were motor inspectors; one was a tractor driver; three were crane operators; one was a washer in the coke plant; and three were laborers. . . .

While respondent criticises the evidence and the attitude of the Board, which is described as being hostile toward employers and particularly toward those who insisted upon their constitutional rights, re-

spondent did not take advantage of its opportunity to present evidence to refute that which was offered to show discrimination and coercion. In this situation, the record presents no ground for setting aside the order of the Board so far as the facts pertaining to the circumstances and purpose of the discharge of the employees are concerned. . . . We turn to the questions of law which the respondent urges in contesting the validity and application of the Act.

First. The scope of the Act.—The Act is challenged in its entirety as an attempt to regulate all industry, thus invading the reserved powers of the States over their local concerns. . . .

If this conception of terms, intent and consequent inseparability were sound, the Act would necessarily fall by reason of the limitation upon the federal power which inheres in the constitutional grant, as well as because of the explicit reservation of the Tenth Amendment. . . . The authority of the federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between "commerce among the several States" and the internal concerns of a State. . . .

But we are not at liberty to deny effect to specific provisions, which Congress has constitutional power to enact, by superimposing upon them inferences from general legislative declarations of an ambiguous character, even if found in the same statute. The cardinal principle of statutory construction is to save and not to destroy. We have repeatedly held that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act. Even to avoid a serious doubt the rule is the same. . . .

We think it clear that the National Labor Relations Act may be construed so as to operate within the sphere of constitutional authority. . . .

There can be no question that the commerce . . . contemplated by the Act . . . is interstate and foreign commerce in the constitutional sense. . . .

This definition is one of exclusion as well as inclusion. The grant of authority to the Board does not purport to extend to the relationship between all industrial employees and employers. Its terms do not impose collective bargaining upon all industry regardless of effects upon interstate or foreign commerce. . . . It is a familiar principle that acts which directly burden or obstruct interstate or foreign commerce, or its free flow, are within the reach of the congressional power. Acts having that effect are not rendered immune because they grow out of labor disputes. . . . We are thus to inquire whether in the instant case the constitutional boundary has been passed.

Second. The unfair labor practices in question. . . .

Sec. 8. It shall be an unfair labor practice for an employer—

“(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.”

“(2) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . .”

Section 8 refers to # 7, which is as follows:

“Sec. 7. Employees shall have the right to self-organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities. . . .”

Thus, in its present application, the statute goes no further than to safeguard the right of employees to self-organization and to select representatives of their own choosing for collective bargaining or other mutual protection without restraint or coercion by their employer.

That is a fundamental right. Employees have as clear a right to organize and select their representatives for lawful purposes as the respondent has to organize its business and select its own officers and agents. . . . *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184, 209. . . . *Texas & N. O. R. Co. v. Railway Clerks*, [281 U.S. 548]. We have reasserted the same principle in sustaining the application of the Railway Labor Act as amended in 1934. *Virginia Railway Co. v. System Foundation*, No. 40, [300 U.S. 515].

Third. The application of the Act to employees engaged in production. Respondent says that whatever may be said of employees engaged in interstate commerce, the industrial relations and activities in the manufacturing department of respondent's enterprise are not subject to federal regulation. The argument rests upon the proposition that manufacturing in itself is not commerce. [Here are cited a line of cases sustaining this proposition beginning with *Kidd v. Pearson*, 128 U.S. 1, and ending with *Carter v. Carter Coal Co.*, 298 U.S. 238.]

The Government distinguishes these cases. The various parts of respondent's enterprise are described as interdependent and as thus involving “a great movement of iron ore, coal and limestone along well-defined paths to the steel mills, then through them, and thence in the form of steel products into the consuming centers of the country—a definite and well-understood course of business.” It is urged that these activities constitute a “stream” or “flow” of commerce, of which the Aliquippa manufacturing plant is the focal point, and that industrial strife at that point would cripple the entire movement. . . . *Stafford v. Wallace*, 258 U.S. 495. . . . *Chicago Board of Trade v. Olsen*, 262 U.S. 1. . . .

. . . . The congressional authority to protect interstate commerce from burdens and obstructions is not limited to transactions which can be deemed to be an essential part of a “flow” of interstate or foreign

commerce. Burdens and obstructions may be due to injurious action springing from other sources. The fundamental principle is that the power to regulate commerce is the power to enact "all appropriate legislation" for "its protection and advancement" (*The Daniel Ball*, 10 Wall. 557, 564); to adopt measures "to promote its growth and insure its safety" (*Mobile County v. Kimball*, 102 U.S. 691, 696, 697); "to foster, protect, control and restrain." *Second Employers' Liability Cases*, (223 U.S. 1, 51.). . . . Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control. *Schechter Poultry Corp. v. United States*, (295 U.S. 495.). . . . The question is necessarily one of degree. . . .

The close and intimate effect which brings the subject within the reach of federal power may be due to activities in relation to productive industry although the industry when separately viewed is local. This has been abundantly illustrated in the application of the federal Anti-Trust Act. . . .

Upon the same principle, the Anti-Trust Act has been applied to the conduct of employees engaged in production. . . .

It is thus apparent that the fact that the employees here concerned were engaged in production is not determinative. The question remains as to the effect upon interstate commerce of the labor practice involved. . . . [The *Schechter* and *Carter*] cases are not controlling here.

Fourth. Effects of the unfair labor practice in respondent's enterprise.—Giving full weight to respondent's contention with respect to a break in the complete continuity of the "stream of commerce" by reason of respondent's manufacturing operations, the fact remains that the stoppage of those operations by industrial strife would have a most serious effect upon interstate commerce. . . . It is obvious that it would be immediate and might be catastrophic. We are asked to shut our eyes to the plainest facts of our national life and to deal with the question of direct and indirect effects in an intellectual vacuum. . . . When industries organize themselves on a national scale, making their relation to interstate commerce the dominant factor in their activities, how can it be maintained that their industrial labor relations constitute a forbidden field into which Congress may not enter when it is necessary to protect interstate commerce from the paralyzing consequences of industrial war? We have often said that interstate commerce itself is a practical conception. It is equally true that interferences with that commerce must be appraised by a judgment that does not ignore actual experience.

Experience has abundantly demonstrated that the recognition of the

right of employees to self-organization and to have representatives of their own choosing for the purpose of collective bargaining is often an essential condition of industrial peace. . . . This is such an outstanding fact in the history of labor disturbances that it is a proper subject of judicial notice and requires no citation of instances. . . . And of what avail is it to protect the facility of transportation, if interstate commerce is throttled with respect to the commodities to be transported! . . .

Fifth. The means which the Act employs.—Questions under the due process clause and other constitutional restrictions.—Respondent asserts its right to conduct its business in an orderly manner without being subjected to arbitrary restraints. What we have said points to the fallacy in the argument. . . .

The Act does not compel agreements between employers and employees. It does not compel any agreement whatever. . . . The Act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them. . . .

The Act has been criticised as one-sided in its application; that it subjects the employer to supervision and restraint and leaves untouched the abuses for which employees may be responsible. . . . But we are dealing with the power of Congress, not with a particular policy or with the extent to which policy should go. . . . The question in such cases is whether the legislature, in what it does prescribe, has gone beyond constitutional limits.

The procedural provisions of the Act are assailed. . . . The Act establishes standards to which the Board must conform. There must be complaint, notice and hearing. The Board must receive evidence and make findings. The findings as to the facts are to be conclusive, but only if supported by evidence. The order of the Board is subjected to review by the designated court, and only when sustained by the court may the order be enforced. Upon that review all questions of the jurisdiction of the Board and the regularity of its proceedings, all questions of constitutional right or statutory authority, are open to examination by the court. . . . Respondent was notified and heard. . . . The facts found by the Board support its order and the evidence supports the findings. . . .

The order of the Board required the reinstatement of the employees who were found to have been discharged because of their "union activity" and for the purpose of "discouraging membership in the union." That requirement was authorized by the Act. # 10 (c). . . .

Respondent complains that the Board not only ordered reinstatement but directed the payment of wages for the time lost by the discharge. . . . This part of the order was also authorized by the Act. # 10 (c). . . . The Seventh Amendment . . . has no application to cases where

recovery of money damages is an incident to equitable relief even though money damages might have been recovered in an action at law. . . . It does not apply where the proceeding is not in the nature of a suit at common law. . . .

The instant case is not a suit at common law or in the nature of such a suit. The proceeding is one unknown to the common law. It is a statutory proceeding. . . .

Our conclusion is that the order of the Board was within its competency and that the Act is valid as here applied. . . .³

MR. JUSTICE McREYNOLDS delivered the following dissenting opinion in the cases preceding:

MR. JUSTICE VAN DEVANTER, MR. JUSTICE SUTHERLAND, MR. JUSTICE BUTLER and I are unable to agree with the decisions just announced. . . .

The Court, as we think, departs from well-established principles followed in *Schechter Corp. v. United States*, 295 U.S. 495 (May, 1935) and *Carter v. Carter Coal Co.*, 298 U.S. 238 (May, 1936). Upon the authority of those decisions, the Circuit Courts of Appeals of the Fifth, Sixth and Second Circuits in the causes now before us have held the power of Congress under the commerce clause does not extend to relations between employers and their employees engaged in manufacture, and therefore the Act conferred upon the National Labor Relations Board no authority in respect of matters covered by the questioned orders. . . . Six district courts, on the authority of *Schechter's* and *Carter's* cases, have held that the Board has no authority to regulate relations between employers and employees engaged in local production. No decision or judicial opinion to the contrary has been cited, and we find none. Every consideration brought forward to uphold the Act before us was applicable to support the Acts held unconstitutional in causes decided within two years. And the lower courts rightly deemed them controlling. . . .

The three respondents happen to be manufacturing concerns—one large, two relatively small. The Act is now applied to each upon grounds common to all. Obviously what is determined as to these concerns may gravely affect a multitude of employers who engage in a great variety

³ This is the principal of three cases known as the Labor Board Cases. The second case is *National Labor Relation Board v. Fruehauf Trailer Co.*, 301 U.S. 49. The Act and the orders of the Board were sustained on the authority of the principal case, as applied to a manufacturer of commercial trailers with an interstate market. The third case is *National Labor Relations Board v. Friedman-Harry Marks Clothing Co., Id.*, 58. Here both the Act and the Board were sustained as against the contentions of respondent, a garment manufacturer doing an interstate business.

of private enterprises—mercantile, manufacturing, publishing, stock-raising, mining, etc. It puts into the hands of a Board power of control over purely local industry beyond anything heretofore deemed permissible. . . .

In each cause the Labor Board formulated and then sustained a charge of unfair labor practices towards persons employed only in production. It ordered restoration of discharged employees to former positions with payment for losses sustained. . . .

Respondent in No. 419 is a large, integrated manufacturer of iron and steel products—the fourth largest in the United States. . . . The Corporation has assets amounting to \$180,000,000, gross income of \$47,600,000, and employs 22,000 people—10,000 in the Aliquippa plant where the complaining employees worked. So far as they relate to essential principles presently important, the activities of this Corporation, while large, do not differ materially from those of the other respondents and very many small producers and distributors. . . .

Our concern is with those activities which are common to the three enterprises. Such circumstances as are merely fortuitous—size, character of products, etc.—may be put on one side. The wide sweep of the statute will more readily appear if consideration be given to the Board's proceedings against the smallest and relatively least important—the Clothing Company. . . .

The Clothing Company is a typical small manufacturing concern which produces less than one-half of one per cent of men's clothing produced in the United States and employs 800 of the 150,000 workmen engaged therein. If closed today, the ultimate effect on commerce in clothing obviously would be negligible. It stands alone, is not seeking to acquire a monopoly or to restrain trade. There is no evidence of a strike by its employees at any time or that one is now threatened, and nothing to indicate the probable result if one should occur.

Some account of the Labor Board's proceedings against this Company will indicate the ambit of the Act as presently construed.

September 28, 1935, the Amalgamated Clothing Workers of America filed with the Board a "Charge" stating that the Clothing Company had engaged in unfair labor practices in that it had unjustifiably discharged, demoted or discriminated against some twenty named members of that union and, in other ways, had restrained employees in the exercise of their right of free choice of representatives for collective bargaining. . . .

This "Charge" contained no description of the Company's business, no word concerning any strike against it past, present or threatened. The number of persons employed or how many of these had joined the union is not disclosed.

Thereupon the Board issued a "Complaint" which recited the particulars of the "Charge"

The respondent filed a special appearance objecting to the Board's jurisdiction, which was overruled; also an answer admitting the discharge of certain employees, but otherwise it generally denied the allegations of the "Complaint."

Thereupon the Board demanded access to the Company's private records of accounts, disclosure of the amount of capital invested by its private owners, the names of all its employees, its payrolls, the amounts and character of all purchases and from whom made, the amounts of sales and to whom made the number of employees in the plant during eight years, the names and addresses of the directors and officers of the Company, the names and addresses of its salesmen, the stock ownership of the Company, the affiliation, if any, with other companies, and the former occupations and businesses of its stockholders.

During the hearings held at Richmond and Washington, unfettered by rules of evidence, it received a mass of testimony. . . .

The number of employees who joined the union does not appear; the general attitude of employees towards the union or the Company is not disclosed; the terms of employment are not stated—whether at will, by the day or by the month. What the local Chapter was especially seeking at the time we do not know.

It does not appear that, either prior or subsequent to the "Complaint," there has been any strike, disorder or industrial strife at respondent's factory, or any interference with or stoppage of production or shipment of its merchandise. Nor that alleged unfair labor practices at its plant had materially affected manufacture, sale or distribution; or materially affected, burdened or obstructed the flow of products; or affected, burdened or obstructed the flow of interstate commerce, or tended to do so. . . .

The precise question for us to determine is whether in the circumstances disclosed Congress has power to authorize what the Labor Board commanded the respondent to do. Stated otherwise, in the circumstances here existing could Congress by statute direct what the Board has ordered? General disquisitions concerning the enactment are of minor, if any, importance. . . .

There is no ground on which reasonably to hold that refusal by a manufacturer, whose raw materials come from states other than that of his factory and whose products are regularly carried to other states, to bargain collectively with employees in his manufacturing plant, directly affects interstate commerce. In such business, there is not one but two distinct movements or streams in interstate transportation. The first brings in raw materials and there ends. Then follows manufacture, a

separate and local activity. Upon completion of this, and not before, the second distinct movement or stream in interstate commerce begins and the products go to other states. . . .

It is gravely stated that experience teaches that if an employer discourages membership in "any organization of any kind" "in which employees participate, and which exists for the purpose . . . of dealing with employers . . . , " discontent may follow and this in turn may lead to a strike, and as the outcome of the strike there may be a block in the stream of interstate commerce. Therefore Congress may inhibit the discharge! Whatever effect any cause of discontent may ultimately have upon commerce is far too indirect to justify Congressional regulation. . . .

The right to contract is fundamental and includes the privilege of selecting those with whom one is willing to assume contractual relations. This right is unduly abridged by the Act now upheld. A private owner is deprived of power to manage his own property by freely selecting those to whom his manufacturing operations are to be entrusted. We think this cannot lawfully be done in circumstances like those here disclosed.

It seems clear to us that Congress has transcended the powers granted.

SANTA CRUZ FRUIT PACKING CO. *v.* NATIONAL LABOR RELATIONS BOARD.

Supreme Court of the United States. 1938.

303 U.S. 453.

MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court. . . .

Petitioner is engaged at its plant at Oakland in canning, packing and shipping fruit and vegetables, the bulk of which are grown in that State. During the "peak" season, petitioner employs from 1200 to 1500 persons of whom about 30 are warehousemen. The total "pack" of the year 1935 amounted to about 1,699,270 cases. Of this amount about 37 per cent. were shipped in interstate or foreign commerce, 9.02 per cent. being sent to foreign countries and approximately 473,620 cases, or about 27.89 per cent. to various points in the United States outside California. The sales to purchasers outside the State were under either f. o. b. or c. i. f. San Francisco Bay Point contracts.

The methods of transportation are by water, rail and truck. Export shipments go by water and this is also the chief sort of carriage to points within the United States outside California, about 20 per cent. being shipped by rail and an undetermined amount by truck directly to the

point of destination. From 3,000 to 4,000 cases are loaded daily in the various vehicles of conveyance. . . .

Weighers, Warehousemen and Cereal Workers Local 38-44, International Longshoremen's Association, is a labor organization affiliated with the American Federation of Labor. Its efforts to organize the Oakland plant were begun in July, 1935, and many of the permanent warehousemen made application for membership. When this came to the attention of petitioner early in August, the General Manager announced that he would not permit a union in the plant because of competitive conditions. On their return from a union meeting at which the men were to be initiated, members of the night shift were prevented from entering the plant and the next morning the members of the day crew were similarly excluded. A picket line then formed, on the morning of August 8th, was maintained until September 27th with such effectiveness that eventually the movement of trucks from warehouses to wharves ceased entirely. The Board found: "The teamsters refused to haul Santa Cruz merchandise; the warehousemen at the dock warehouses who ordinarily unload the canned goods from the cars prior to their reloading into the ships . . . also declined to handle Santa Cruz cargo. As members of the sister union, I. L. A. 38-79, the stevedores who move the goods from dock to ship also refused to move Santa Cruz cargo both at the East Bay and San Francisco docks during the entire period that the picket line was maintained. Other unions whose members refused to move 'hot' Santa Cruz cargo were those members of the Sailors who comprised the crews of steam schooners and whose duties include the handling of cargo." Petitioner points out that the refusal of the other unions to handle petitioner's goods was a violation of an arbitration award made in October, 1934, following the San Francisco maritime strike of that year. . . .

The Board concluded that the discharge of the employees named and the refusal to reinstate them constituted an unlawful discrimination under the National Labor Relations Act and that the acts of petitioner had led and tended to lead to labor disputes burdening and obstructing commerce.

Petitioner contends that the manufacturing and processing in which petitioner is engaged are local activities and that the Board was without jurisdiction over the labor dispute involved in this case.

First. There is no question that petitioner was directly and largely engaged in interstate and foreign commerce. We have often decided that sales to purchasers in another State are not withdrawn from federal control because the goods are delivered f. o. b. at stated points within the State of origin for transportation. See . . . *Pennsylvania R. Co. v. Clark Bros. Coal Mining Co.*, 238 U.S. 456, 465-468. A large part of

the interstate commerce of the country is conducted upon that basis and the arrangements that are made between seller and purchaser with respect to the place of taking title to the commodity, or as to the payment of freight, where the actual movement is interstate, do not affect either the power of Congress or the jurisdiction of the agencies which Congress has established. . . .

Second. The power of Congress extends not only to the making of rules governing sales of petitioner's products in interstate commerce, as, for example, with respect to misbranding under the Federal Food and Drugs Act , or with respect to forbidden discriminations in prices under the Clayton Act , but also to the protection of that interstate commerce from burdens, obstructions and interruptions, whatever may be their source. . . . The close and intimate effect which brings the subject within the reach of federal power may be due to activities in relation to productive industry, although that industry when separately viewed is local. It is upon this well-established principle that the constitutionality validity of the National Labor Relations Act has been sustained. *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 38.

Petitioner urges that the principle is inapplicable here as the fruits and vegetables which petitioner prepares for shipment are grown in California and petitioner's operations are confined to that State. . . . The existence of a continuous flow of interstate commerce through the State may indeed readily show the intimate relation of particular transactions to that commerce. . . . But, as we said in the *Jones & Laughlin* case, the instances in which the metaphor of a "stream of commerce" has been used are but particular, and not exclusive, illustrations of the protective power which Congress may exercise. . . . *Id.*, p. 36.

Such injurious action burdening and obstructing interstate trade in manufactured articles may spring from labor disputes irrespective of the origin of the materials used in the manufacturing process. And the place where the manufacturer makes his sales is not controlling if the sales in fact are in interstate commerce. . . .

Third. It is also clear that where federal control is sought to be exercised over activities which separately considered are intrastate, it must appear that there is a close and substantial relation to interstate commerce in order to justify the federal intervention for its protection. However difficult in application, this principle is essential to the maintenance of our constitutional system. The subject of federal power is still "commerce," and not all commerce but commerce with foreign nations and among the several States. The expansion of enterprise has vastly increased the interests of interstate commerce but the constitutional differentiation still obtains. *Schechter Corporation v. United*

States, 295 U.S. 495, 546. "Activities local in their immediacy do not become interstate and national because of distant repercussions." *Id.*, P. 554.

To express this essential distinction, "direct" has been contrasted with "indirect," and what is "remote" or "distant" with what is "close and substantial." Whatever terminology is used, the criterion is necessarily one of degree and must be so defined. This does not satisfy those who seek for mathematical or rigid formulas. But such formulas are not provided by the great concepts of the Constitution such as "interstate commerce," "due process," "equal protection." In maintaining the balance of the constitutional grants and limitations, it is inevitable that we should define their applications in the gradual process of inclusion and exclusion.

There is thus no point in the instant case in a demand for the drawing of a mathematical line. And what is reasonably clear in a particular application is not to be overborne by the simple and familiar dialectic of suggesting doubtful and extreme cases. The critical words of the provision of the National Labor Relations Act in dealing with the described labor practices are "affecting commerce," as defined, # 2 (6). It is plain that the provision cannot be applied by a mere reference to percentages and the fact that petitioner's sales in interstate and foreign commerce amounted to 37 per cent., and not to more than 50 per cent., of its production cannot be deemed controlling. The question that must be faced under the Act upon particular facts is whether the unfair labor practices involved have such a close and substantial relation to the freedom of interstate commerce from injurious restraint that these practices may constitutionally be made the subject of federal cognizance through provisions looking to the peaceable adjustment of labor disputes.

The question of degree is constantly met in other relations. It is met whenever the Interstate Commerce Commission is required to find whether an intrastate rate or practice of an interstate carrier causes an undue and unreasonable discrimination against interstate or foreign commerce. . . . *The Shreveport Case*, 234 U.S. 342, 351. It is met under the Federal Employers' Liability Act, where the question is whether the employee's occupation at the time of his injury is "in interstate transportation or work so closely related to such transportation as to be practically a part of it." *Chicago & N. W. Ry. Co. v. Bolle*, 284 U.S. 74, 78, 79. . . . It is met in the enforcement of the Clayton Act in determining whether the effect of the described provisions in contracts for the sale of commodities is "to substantially lessen competition." . . . *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U.S. 346, 356, 357. . . .

Such questions cannot be escaped by the adoption of any artificial rule.

Fourth. The direct relation of the labor practices and the resulting labor dispute in the instant case to interstate commerce and the injurious effect upon that commerce are fully established. . . . When the men found themselves locked out because of their joining the union, they at once formed a picket line and this was maintained with such effectiveness that eventually "the movement of trucks from warehouse to wharves ceased entirely." The teamsters refused to haul, the warehousemen at the dock warehouses declined to handle, and the stevedores between dock and ship refused to load, petitioner's goods. These became, in the parlance of the men, "hot" cargo. Petitioner says that this was an unlawful conspiracy of those sympathizing with its discharged warehousemen, but it was the discrimination against them which led directly to the interference with the movement from the plant and elicited the support so effectively given.

It would be difficult to find a case in which unfair labor practices had a more direct effect upon interstate and foreign commerce. . . .

MR. JUSTICE CARDOZO and MR. JUSTICE REED took no part in the consideration and decision of this case.

MR. JUSTICE BUTLER, dissenting.

Carter v. Carter Coal Co., 298 U.S. 238, decided that Congress lacks power to regulate terms and conditions of employment of those engaged in local production of commodities sold and about to be shipped in interstate commerce. The circuit court of appeals found two questions for solution. One was whether upon that point the *Carter* case, in 1936, has been overruled by our decision in 1937 in *Labor Board v. Jones & Laughlin*, 301 U.S. 1. The second was whether the power extends to cases where only 39% of goods locally produced are shipped in interstate commerce. The court, one judge dissenting, upheld the order. Each of the judges wrote an opinion; two held this Court has overruled the *Carter* case.

If the decision of the *Carter* case upon the point stated stands, the Board's order cannot be upheld. The lower court made its decision depend upon that question. Save authoritatively to decide it here, there was no reason for granting the writ. But the opinion just announced does not refer to the question.

In the *Jones & Laughlin* and companion cases, four dissenting Justices thought the Court then departed from well-established principles followed in the *Carter* case. . . . And the dissenting opinion insisted

(p. 97) that, under the *Carter* decision, the facts in those cases did not disclose any direct effect upon interstate commerce, and said: "A more remote and indirect interference with interstate commerce or a more definite invasion of the powers reserved to the states is difficult, if not impossible, to imagine."

But the dissent failed to elicit from the Court any statement as to whether it meant to overrule the *Carter* case. The opinion does not discuss that case. . . . The later decisions of this Court involving the power of Congress to deal with labor relations in local production do not refer to the *Carter* case. At least until this Court definitely overrules that decision, it should be followed. . . .

MR. JUSTICE McREYNOLDS concurs in this opinion.

CONSOLIDATED EDISON CO. v. NATIONAL LABOR RELATIONS BOARD.

Supreme Court of the United States. 1938.
305 U.S. 197.

MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court.

The United Electrical and Radio Workers of America, affiliated with the Committee for Industrial Organization, filed a charge, on May 5, 1937, with the National Labor Relations Board that the Consolidated Edison Company of New York and its affiliated companies were interfering with the right of their employees to form, join, or assist labor organizations of their own choosing and were contributing financial and other support . . . to the International Brotherhood of Electrical Workers, an affiliate of the American Federation of Labor. . . .

It appeared that between May 28, 1937, and June 16, 1937, the companies had entered into agreements with the International Brotherhood of Electrical Workers and its local unions, providing for the recognition of the Brotherhood as the collective bargaining agency for those employees who were its members. . . . The Board found that these contracts were executed under such circumstances that they were invalid and required the companies to desist from giving them effect. At the same time the Board decided that the companies had not engaged in unfair labor practices within the meaning of § 8 (2) of the Act. That clause makes it an unfair labor practice to "dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it." . . .

The companies petitioned the Circuit Court of Appeals to set aside the order and a petition for the same purpose was presented by the

Brotherhood and its locals. . . . The Board in turn asked the court to enforce the order. The United Electrical and Radio Workers of America appeared in support of the Board. The court granted the Board's petition. . . .

First. The jurisdiction of the Board.—That is, was the proceeding within the scope of its authority validly conferred? The petitioning companies constitute an integrated system. With the exception of one company which maintains underground ducts for electrical conductors in New York City, they are all public utilities engaged in supplying electric energy, gas, and steam (and certain by-products) within that City and adjacent Westchester County. The enterprise is one of great magnitude. The companies serve over 3,500,000 electric and gas customers,—a large majority using the service for residential and domestic purposes. In 1936 the companies supplied about 97.5 per cent. of the total electric energy sold in the City of New York and about one hundred per cent. of that sold in Westchester County. They do not sell for resale without the State. They have about 42,000 employees, their total payrolls in 1936, with retirement annuities and separation allowances, amounting to nearly \$82,000,000.

Petitioners urge that these predominant intrastate activities, carried on under the plenary control of the State of New York in the exercise of its police power, are not subject to federal authority. It does not follow, however, because these operations of the utilities are of vast concern to the people of the City and State of New York, that they do not also involve the interests of interstate and foreign commerce in such a degree that the Federal Government was entitled to intervene for their protection. For example, the governance of the intrastate rates of a railroad company may be of great importance to the State and an appropriate object of the exertion of its power, but the Federal Government may still intervene to protect interstate commerce from injury caused by intrastate operations and to that end may override intrastate rates and supply a dominant federal rule. *The Shreveport Case*, 234 U.S. 342. . . .

In the present instance we may lay on one side, as did the Circuit Court of Appeals, the mere purchases by the utilities of the supplies of oil, coal, etc., although very large, which come from without the State and are consumed in the generation and distribution of electric energy and gas. Apart from those purchases, there is undisputed and impressive evidence of the dependence of interstate and foreign commerce upon the continuity of the service of the petitioning companies. They supply electric energy to the New York Central Railroad Company, the New York, New Haven and Hartford Railroad Company, and the Hudson and Manhattan Railroad Company (operating a tunnel service to New

Jersey) for the lighting and operation of passenger and freight terminals, and for the movement of interstate trains. They supply the Port of New York Authority with electric energy for the operation of its terminal and the Holland Tunnel. They supply a majority of the piers of transatlantic and coastwise steamship companies along the North and East Rivers, within the City of New York, for lighting, freight handling and related uses. They serve the Western Union Telegraph Company, the Postal Telegraph Company, and the New York Telephone Company with power for transmitting and receiving messages, local and interstate. They supply electric energy for the transatlantic radio service of the Radio Corporation of America. They provide electric energy for the Floyd Bennett Air Field in Brooklyn for various purposes, including field illumination, a radio beam and obstruction lighting. Under contracts with the Federal Government they supply electric energy for six lighthouses and eight beacon or harbor lights; also light, heat and power for the general post office and branch post offices, the United States Barge Office, the Customs House, appraisers' warehouse and various federal office buildings.

It cannot be doubted that these activities, while conducted within the State, are matters of federal concern. In their totality they rise to such a degree of importance that the fact that they involve but a small part of the entire service rendered by the utilities in their extensive business is immaterial in the consideration of the existence of the federal protective power. The effect upon interstate and foreign commerce of an interruption through industrial strife of the service of the petitioning companies was vividly described by the Circuit Court of Appeals in these words: "Instantly, the terminals and trains of three great interstate railroads would cease to operate; interstate communication by telegraph, telephone, and radio would stop; lights maintained as aids to navigation would go out; and the business of interstate ferries and of foreign steamships, whose docks are lighted and operated by electric energy, would be greatly impeded. Such effects we cannot regard as indirect and remote." 95 F. 2d 390, 394.

If industrial strife due to unfair labor practices actually brought about such a catastrophe, we suppose that no one would question the authority of the Federal Government to intervene in order to facilitate the settlement of the dispute and the resumption of the essential service to interstate and foreign commerce. But it cannot be maintained that the exertion of federal power must await the disruption of that commerce. Congress was entitled to provide reasonable preventive measures and that was the object of the National Labor Relations Act.

Congress did not attempt to deal with particular instances. It created for that purpose the National Labor Relations Board. In confer-

ring authority upon that Board, Congress had regard to the limitations of the constitutional grant of federal power. Thus, the "commerce" contemplated by the Act (aside from that within a Territory or the District of Columbia) is interstate and foreign commerce. The unfair labor practices which the Act purports to reach are those affecting that commerce. # 10(a). In determining the constitutional bounds of the authority conferred, we have applied the well-settled principle that it is the effect upon interstate or foreign commerce, not the source of the injury, which is the criterion. It is not necessary to repeat what we said upon this point in the review of our decisions in the case of *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, *supra*. And whether or not particular action in the conduct of intrastate enterprises does affect that commerce in such a close and intimate fashion as to be subject to federal control, is left to be determined as individual cases arise. . . .

We conclude that the Board had authority to entertain this proceeding against the petitioning companies. . . .

Fourth. The Brotherhood contracts. The findings of the Board that the contracts with the Brotherhood and its locals were invalid, and the Board's order requiring the companies to desist from giving effect to these contracts, present questions of major importance. . . .

. . . . Not only did the complaint as amended fail to assail the contracts but it was stated by the attorney for the Board upon the hearing that the complaint was not directed against the Brotherhood. . . .

Further, the Act gives no express authority to the Board to invalidate contracts with independent labor organizations. That authority, if it exists, must rest upon the provisions of # 10(c). That section authorizes the Board, when it has found the employer guilty of unfair labor practices, to require him to desist from such practices "and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act." We think that this authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board be of the opinion that the policies of the Act might be effectuated by such an order.

The power to command affirmative action is remedial, not punitive, and is to be exercised in aid of the Board's authority to restrain violations and as a means of removing or avoiding the consequences of violation where those consequences are of a kind to thwart the purposes of the Act. . . . Here, there is no basis for a finding that the contracts with the Brotherhood and its locals were a consequence of the unfair labor practices found by the Board or that these contracts in themselves

thwart any policy of the Act or that their cancellation would in any way make the order to cease the specified practices any more effective. . . .

MR. JUSTICE BUTLER, with whom MR. JUSTICE McREYNOLDS concurred, agreed with the Court's decision that the Board lacked authority to invalidate the Brotherhood contracts, but held that the Board had no jurisdiction.

MR. JUSTICE REED, with whom MR. JUSTICE BLACK concurred, dissented from that part of the opinion sustaining the decision that the Board lacked power to invalidate the Brotherhood contracts.

ARMOUR & CO. v. WANTOCK.

Supreme Court of the United States. 1944.
323 U.S. 126.

MR. JUSTICE JACKSON delivered the opinion of the Court.

Armour and Company operates a soap factory in Chicago which produces goods for interstate commerce. It maintains a private fire-fighting force to supplement that provided by the city. The respondents were employed as fire fighters only, and otherwise had nothing to do with the production of goods. They were not night watchmen, a separate force being maintained for that purpose. They were not given access to the factory premises at night except by call or permission of the watchmen.

These men worked in shifts which began at 8:00 a. m., when they punched a time clock. The following nine hours, with a half hour off for lunch, they worked at inspecting, cleaning, and keeping in order the company's fire-fighting apparatus. . . . At 5:00 p. m. they "punched out" on the time clock. Then they remained on call in the fire hall, provided by the Company and located on its property, until the following morning at 8:00. They went off duty entirely for the next twenty-four hours and then resumed work as described.

During this nighttime on duty they were required to stay in the fire hall, to respond to any alarms, to make any temporary repairs of fire apparatus, and take care of the sprinkler system. . . . The time spent in these tasks was recorded and amounts on average to less than a half hour a week. . . .

The litigation concerns the time during which these men were required to be on the employer's premises, to some extent amenable to

the employer's discipline, subject to call, but not engaged in any specific work. The Company provided cooking equipment, beds, radios, and facilities for cards and amusements with which the men slept, ate, or entertained themselves pretty much as they chose. They were not, however, at liberty to leave the premises except that, by permission of the watchman, they might go to a nearby restaurant for their evening meal.

A single fixed weekly wage was paid to the men, regardless of the variation in hours per week spent on regular or on firehouse duty, the schedule of shifts occasioning considerable variation in weekly time.

This fire-fighting service was not maintained at the instance of the Company's officials in charge of production, but at that of its insurance department. Several other plants of Armour and those of numerous other manufacturers in the same industry produce similar goods for commerce without maintaining such a fire-fighting service.

On these facts the petitioner contends: first, that employees in such auxiliary fire-fighting capacity are not engaged in commerce or in production of goods for commerce, or in any occupation necessary to such production within the meaning of the [Fair Labor Standards] Act; and, second, that even if they were within the Act, time spent in sleeping, eating, playing cards, listening to the radio, or otherwise amusing themselves, cannot be counted as working time. The employees contended in the District Court that all of such stand-by time, however spent, was employment time within the Act. . . .

The District Court held that the employees in such service were covered by the Act. But it declined to go to either extreme demanded by the parties as to working time. Usual hours for sleep and for eating it ruled would not be counted, but the remaining hours should. . . .

First. Were the employees in question covered by the Fair Labor Standards Act? Section 7 of the Act . . . by its own terms applies maximum hours provisions to two general classes of employees, those who are engaged in commerce and those who are engaged in producing goods for commerce. Section 3(j) adds another by the provision that "an employee shall be deemed to have been engaged in the production of goods if such employee was employed . . . in any process or occupation necessary to the production" of goods for commerce. The courts below held that the respondents were included in this class. The petitioner seeks to limit those entitled to this classification by reading the word "necessary" in the highly restrictive sense of "indispensable," "essential," and "vital"—words it finds in previous pronouncements of this Court dealing with this clause. *Kirschbaum Co. v. Walling*, 316 U.S. 517, 524-26; *Overstreet v. North Shore Corp.*, 318 U.S. 125, 129, 130. These and other cases, says petitioner, indicate that in applying the Act a distinction must be made between those processes or occupations which

an employer finds advantageous in his own plan or production and those without which he could not practically produce at all. Present respondents, it contends, clearly fall within the former category because soap can be and in many other plants is produced without the kind of fire protection which these employees provide.

The argument would give an unwarranted rigidity to the application of the word "necessary," which has always been recognized as a word to be harmonized with its context. See *McCulloch v. Maryland*, 4 Wheat. 316, 413, 414. No hard and fast rule will tell us what can be dispensed with in "the production of goods." All depends upon the detail with which the bare phrase is clothed. . . . What is practically necessary to it will depend on its environment and position. A plant may be so built as to be an exceptional fire hazard, or it may be menaced by neighborhood. It may be farther from fire protection, or its use of inflammable materials may make instantaneous response to fire alarm of peculiar importance to it. . . . In their context, the restrictive words like "indispensable," which petitioner quotes, do not have the automatic significance petitioner seeks to give them. What is required is a practical judgment as to whether the particular employer actually operates the work as part of an integrated effort for the production of goods.

The fact that respondents were hired by an employer which shows no ostensible purpose for being in business except to produce goods for commerce is not without weight, even though we recognized in *Kirschbaum Co. v. Walling* that it might not always be decisive (316 U.S. at 525). A court would not readily assume that a corporation's management was spending stockholders' money on a mere hobby or an extravagance. The company does not prove or assert that this fire protection is so unrelated to its business of production that it does not for income-tax purposes deduct the wages of these employees from gross income as "ordinary and necessary expenses" The record shows that this department not only helps to safeguard the continuity of production against interruption by fire but serves a fiscal purpose as well. Without the department, insurance could not be obtained at any price except by employing enough watchmen to make hourly rounds; with it, only enough watchmen for rounds every two hours are needed. This saves twelve watchmen, or about \$17,600 a year, and reduces insurance premiums by \$1,200 a year. What the net savings are has not been stipulated, but it is clear that this so-called "de luxe" service is maintained because it is good business to do so. More is necessary to a successful enterprise than that it be physically able to produce goods for commerce. It also aims to produce them at a price at which it can maintain its competitive place, and an occupation is not to be excluded from

the Act merely because it contributes to economy or to continuity of production rather than to volume of production.

If some of the phrases quoted from previous decisions describe a higher degree of essentiality than these respondents can show, it must be observed that they were all uttered in cases in which the employees were held to be within the Act. A holding that a process or occupation described as "indispensable" or "vital" is one "necessary" within the Act cannot be read as an authority that all which cannot be so described are out of it. *McLeod v. Threlkeld*, 319 U.S. 491, which did exclude the employee from the scope of the Act, is not in point here because it involved application of the other clause of the Act, covering employees engaged "in commerce," and the test of whether one is in commerce is obviously more exacting than the test of whether his occupation is necessary to production for commerce.

But we think the previous cases indicate clearly that respondents are within the Act. *Kirschbaum v. Walling*, *supra*, held that watchmen, as well as engineers, firemen, carpenters and others, were covered, because they contributed to "the maintenance of a safe, habitable building" which was, in turn, necessary for the production of goods. Again, in *Walton v. Southern Package Corp.*, 320 U.S. 540, the "necessary for production" clause was held to cover a night watchman for a manufacturing company, and we pointed to the reduction of fire insurance premiums as evidence that a watchman "would make a valuable contribution to the continuous production of respondent's goods." The function of these employees is not significantly different. . . .

Second. Was it error to count time spent in playing cards and other amusements, or in idleness, as working time?

Here, too, the employer interprets former opinions of the Court as limitations on the Act. It cites statements that the Congressional intent was "to guarantee either regular or overtime compensation for all *actual work* or employment" and that "Congress here was referring to work or employment as those words are commonly used—as *meaning physical or mental exertion* (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business" (italics supplied). *Tennessee Coal, Iron & R. Co. v. Muscoda Local*, 321 U.S. 590, 597, 598. It is timely again to remind counsel that words of our opinions are to be read in the light of the facts of the case under discussion. To keep opinions within reasonable bounds precludes writing into them every limitation or variation which might be suggested by the circumstances of cases before the Court. General expressions transposed to other facts are often misleading. The context of the language cited here from the *Tennessee Coal* case should be sufficient to indicate that the quoted

phrases were not intended as a limitation on the Act, and have no necessary application to other states of facts.

Of course an employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to happen. . . . Readiness to serve may be hired, quite as much as service itself. Whether time is spent predominantly for the employer's benefit or for the employee's is a question dependent upon all the circumstances of the case.

That inactive duty may be duty nonetheless is not a new principle invented for application to this Act. In *Missouri, K. & T. R. Co. v. United States*, 231 U.S. 112, 119, the Court held that inactive time was to be counted in applying a federal Act prohibiting the keeping of employees on duty for more than sixteen consecutive hours. . . .

Strikes and Lockouts

NATIONAL LABOR RELATIONS BOARD *v.* FANSTEEL METALLURGICAL CORP.

Supreme Court of the United States. 1939.
306 U.S. 240.

MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court. . . .

Respondent, Fansteel Metallurgical Corporation, is engaged at North Chicago, Illinois, in the manufacture and sale of products made from rare metals. No question is raised as to the intimate relation of its operations to interstate commerce or the effect upon that commerce of the unfair labor practices with which the corporation is charged. The findings of the Board show that in the summer of 1936 a group of employees organized Lodge 66 under the auspices of a committee of the Amalgamated Association of Iron, Steel and Tin Workers of North America; that respondent employed a "labor spy" to engage in espionage within the Union that on September 10, 1936, respondent's superintendent was requested to meet with a committee of the Union ; that a committee presented a contract relating to working conditions; that the superintendent objected to "closed-shop and check-off provisions" and announced that it was respondent's policy to refuse recognition to "outside" unions; that on September 21, 1936, the superintendent refused to confer with the committee in which an "outside" organizer had been included; that by February 17, 1937, 155 of respondent's 229 employees in that unit had joined the Union and had designated it as their collective bargaining representative; that on that date, a committee of the Union met twice with the superintendent, who refused to bargain with the Union. . . .

Shortly after the second meeting in the afternoon of February 17th the Union committee decided upon a "sit-down strike" by taking over and holding two of respondent's "key" buildings. These were thereupon occupied by about 95 employees. Work stopped and the remainder of the plant also ceased operations. . . . At about six o'clock in the evening the superintendent, accompanied by police officials and respondent's counsel, went to each of the buildings and demanded that the men leave. They refused, and respondent's counsel "thereupon announced in loud tones that all the men in the plant were discharged for the seizure and retention of the buildings." The men continued to occupy the buildings until February 26, 1937. . . .

On February 18th, respondent obtained from the state court an injunction order requiring the men to surrender the premises. The men refused to obey the order and a writ of attachment for contempt was served on February 19th. Upon the men's refusal to submit, a pitched battle ensued and the men successfully resisted the attempt by the sheriff to evict and arrest them. . . . On February 26th the sheriff with an increased force of deputies made a further attempt and this time, after another battle, the men were ousted and placed under arrest. Most of them were eventually fined and given jail sentences for violating the injunction.

Respondent on regaining possession undertook to resume operations, and production gradually began. . . . New men were hired to fill the positions of those remaining on strike. . . .

Early in April a labor organization known as Rare Metal Workers of America, Local No. 1, was organized among respondent's employees. There was a meeting . . . and the balloting resulted in a vote of 185 to 15 in favor of the formation of an "independent" organization. . . .

Upon the basis of these findings and its conclusions of law, the Board . . . ordered the following affirmative action . . . to offer, upon application, to the employees who went on strike . . . "immediate and full reinstatement to their former positions," with back pay, dismissing, if necessary, all persons hired since . . . ; to withdraw all recognition from Rare Metal Workers of America, Local No. 1. . . .

First. The unfair labor practices. . . . These conclusions are supported by the findings of the Board. . . .

Second. The discharge of the employees for illegal conduct in seizing and holding respondent's buildings. . . . This conduct on the part of the employees manifestly gave good cause for their discharge unless the National Labor Relations Act abrogates the right of the employer to refuse to retain in his employ those who illegally take and hold possession of his property.

Third. The authority of the Board to require the reinstatement of

the employees thus discharged.—The contentions of the Board in substance are these: (1) That the unfair labor practices of respondent led to the strike and thus furnished ground for requiring the reinstatement of the strikers; (2) That under the terms of the Act employees who go on strike because of an unfair labor practice retain their status as employees and are to be considered as such despite discharge for illegal conduct; (3) That the Board was entitled to order reinstatement or re-employment in order to “effectuate the policies” of the Act.

(1) For the unfair labor practices of respondent the Act provided a remedy. Interference in the summer and fall of 1936 with the right of self-organization could at once have been made the subject of complaint to the Board. The same remedy was available to the employees when collective bargaining was refused on February 17, 1937. But reprehensible as was that conduct of the respondent, there is no ground for saying that it made respondent an outlaw or deprived it of its legal rights to the possession and protection of its property. The employees had the right to strike but they had no license to commit acts of violence or to seize their employer's plant. . . . The seizure and holding of the buildings was itself a wrong apart from any acts of sabotage. But in its legal aspect the ousting of the owner from lawful possession is not essentially different from an assault upon the officers of an employing company, or the seizure and conversion of its goods, or the despoiling of its property or other unlawful acts in order to force compliance with demands. To justify such conduct because of the existence of a labor dispute or of an unfair labor practice would be to put a premium on resort to force instead of legal remedies and to subvert the principles of law and order which lie at the foundations of society.

As respondent's unfair labor practices afforded no excuse for the seizure and holding of its buildings, respondent had its normal rights of redress. Those rights, in their most obvious scope, included the right to discharge the wrongdoers from its employ. . . .

(2) In construing the Act in *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45, 46, we said that it “does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them”; that the employer “may not, under cover of that right, intimidate or coerce its employees with respect to their self-organization and representation, and, on the other hand, the Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons than such intimidation and coercion.” . . .

But the Board . . . insists that here the status of the employees was continued, despite discharge for unlawful conduct, by virtue of the term “employee” in § 2 (3). By that definition the term includes “any

individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment,"

We think that the argument misconstrues the statute. We are unable to conclude that Congress intended to compel employers to retain persons in their employ regardless of their unlawful conduct,—to invest those who go on strike with an immunity from discharge for acts of trespass or violence against the employer's property, which they would not have enjoyed had they remained at work. We find no such expression in the cited provision.

We think that the true purpose of Congress is reasonably clear. Congress was intent upon the protection of the right of employees to self-organization and to the selection of representatives of their own choosing for collective bargaining without restraint or coercion. The conduct thus protected is lawful conduct. Congress also recognized the right to strike. But this recognition plainly contemplates a lawful strike,—the exercise of the unquestioned right to quit work. As we said in *National Labor Relations Board v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 347, "if men strike in connection with a current labor dispute their action is not to be construed as a renunciation of the employment relation and they remain employees for the remedial purposes specified in the Act." There is thus abundant opportunity for the operation of # 2 (3) without construing it as countenancing lawlessness or as intended to support employees in acts of violence against the employer's property by making it impossible for the employer to terminate the relation upon that independent ground.

Here the strike was illegal in its inception and prosecution. As the Board found, it was initiated by the decision of the Union Committee "to take over and hold two of the respondent's 'key' buildings." It was pursuant to that decision that the men occupied the buildings and the work stopped. This was not the exercise of "the right to strike" to which the Act referred. It was not a mere quitting of work and statement of grievances in the exercise of pressure recognized as lawful. It was an illegal seizure of the buildings in order to prevent their use by the employer in a lawful manner and thus by acts of force and violence to compel the employer to submit. When the employees resorted to that sort of compulsion they took a position outside the protection of the statute and accepted the risk of the termination of their employment upon grounds aside from the exercise of the legal rights which the statute was designed to conserve.

(3) The authority to require affirmative action to "effectuate the policies" of the Act is broad but it is not unlimited. It has the

essential limitations which inhere in the very policies of the Act which the Board invokes. Thus in *Consolidated Edison Co. v. National Labor Relations Board*, 305 U.S. 197, we held that the authority to order affirmative action did not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board is of the opinion that the policies of the Act may be effectuated by such an order. We held that the power to command affirmative action is remedial, not punitive, and is to be exercised in aid of the Board's authority to restrain violations and as a means of removing or avoiding the consequences of violation where those consequences are of a kind to thwart the purposes of the Act.

We repeat that the fundamental policy of the Act is to safeguard the rights of self-organization and collective bargaining, and thus by the promotion of industrial peace to remove obstructions to the free flow of commerce as defined by the Act. There is not a line in the statute to warrant the conclusion that it is any part of the policies of the Act to encourage employees to resort to force and violence in defiance of the law of the land. On the contrary, the purpose of the Act is to promote peaceful settlements of disputes by providing legal remedies for the invasion of the employees' rights. . . . The affirmative action that is authorized is to make these remedies effective in the redress of the employees' rights, . . . not to license them to commit tortious acts or to protect them from the appropriate consequences of unlawful conduct. We are of the opinion that to provide for the reinstatement or reemployment of employees guilty of the acts which the Board finds to have been committed in this instance would not only not effectuate any policy of the Act but would directly tend to make abortive its plan for peaceable procedure.

. . . . We think that a clearer case could hardly be presented and that, whatever discretion may be deemed to be committed to the Board, its limits were transcended by the order under review. . . .

Fourth We are thus returned to the question already discussed and we think that aiders and abettors, likewise guilty of unlawful conduct, are in no better case than the "sit-down" strikers themselves. . . .

Fifth With respect to a miscellaneous group the Board has not supplied specific findings upon the points in controversy. . . .

Sixth. *The requirement that respondent shall bargain collectively with Lodge 66 of the Amalgamated Association.* In view of the charge in the situation by reason of the valid discharge of the "sit-down" strikers and the filling of positions with new men, we see no basis for a conclusion that after resumption of work Lodge 66 was the choice of a

majority of respondent's employees for the purpose of collective bargaining. . . .

Seventh. The requirement that respondent shall withdraw all recognition from Rare Metal Workers of America, Local No. 1.

While respondent presents a strong protest, insisting that Local No. 1 of the Rare Metal Workers was the free choice of the employees after work was resumed, we cannot say that there is not substantial evidence that the formation of this organization was brought about through promotion efforts of respondent contrary to the provisions of # 8 (2), and we think that the order of the Board in this respect should be sustained. . . .

MR. JUSTICE FRANKFURTER took no part in the consideration and decision of this case.

MR. JUSTICE STONE, concurring in part.

I concur in so much of the Court's decision as holds that the Board was without statutory authority to order reinstatement of those employees who were discharged on February 17, 1937. But I rest this conclusion solely on the construction of # 2 (3) and # 10 (c) of the National Labor Relations Act. . . .

As to the fourteen employees who aided and abetted the sit-down strike, but who were not discharged, I think they retained their status under # 2 (3), and that the Board had power to reinstate them. Whether that power should be exercised was a matter committed to the Board's discretion, not ours. . . .

MR. JUSTICE REED, dissenting in part.

. . . . The issue while important is narrow. Can an employee, on strike or let out by an unfair labor practice, be discharged, finally, by an employer so as to be ineligible for reinstatement under the act?

The issue so stated glows feebly apart from the fire of controversy. . . . Disapproval of a sit-down does not logically compel the acceptance of the theory that an employer has the power to bar his striking employee from the protection of the Labor Act.

. . . . As now construed by the Court, the employer may discharge any striker, with or without cause, so long as the discharge is not used to interfere with self-organization or collective bargaining. Friction easily engendered by labor strife may readily give rise to conduct, from nose-thumbing to sabotage, which will give fair occasion for discharge on grounds other than those prohibited by the Labor Act.

. . . . The constitutional problem involved in such a conclusion is not different from the one involved in compelling an employer to reinstate an employee, discharged for union activity. There is here no protection for unlawful activity. Every punishment which compelled obedience to law still remains in the hands of the peace officers. It is only that the act of ceasing work in a current labor dispute involving unfair labor practices suspends for a period, not now necessary to determine, the right of an employer to terminate the relation. The interference with the normal exercise of the right to discharge extends only to the necessity of protecting the relationship in industrial strife. . . .

Mr. JUSTICE BLACK concurs in this dissent.

PHELPS DODGE CORP. v. NATIONAL LABOR RELATIONS BOARD.

Supreme Court of the United States. 1941.
313 U.S. 177.

Mr. JUSTICE FRANKFURTER delivered the opinion of the Court.

The dominating question which this litigation brings here for the first time is whether an employer subject to the National Labor Relations Act may refuse to hire employees solely because of their affiliations with a labor union. Subsidiary questions grow out of this central issue relating to the means open to the Board to "effectuate the policies of this Act," if it finds such discrimination in hiring an "unfair labor practice." Other questions touching the remedial powers of the Board are also involved. . . .

The source of the controversy was a strike, begun on June 10, 1935, by the International Union of Mine, Mill and Smelter Workers at Phelps Dodge's Copper Queen Mine, Bisbee, Arizona. Picketing of the mine continued until August 24, 1935, when the strike terminated. During the strike, the National Labor Relations Act came into force. Act of July 5, 1935, 49 Stat. 449. . . . The basis of the Board's conclusion that the Corporation had committed unfair labor practices in violation of # 8(3) of the Act was a finding, not challenged here, that a number of men had been refused employment because of their affiliations with the Union. Of these men, two, Curtis and Daugherty, had ceased to be in the Corporation's employ before the strike but sought employment after its close. The others, thirty-eight in number, were strikers. To "effectuate the policies" of the Act, # 10(c), the Board ordered the Corporation to offer Curtis and Daugherty jobs and to make them whole from the loss of pay resulting from the refusal to hire them, and it ordered thirty-

seven of the strikers reinstated with back pay, and the other striker made whole for loss in wages up to the time he became unemployable. Save for a modification presently to be discussed, the Circuit Court of Appeals enforced the order affecting the strikers but struck down the provisions relating to Curtis and Daugherty.

First. The denial of jobs to men because of union affiliations is an old and familiar aspect of American industrial relations. Therefore, in determining whether such discrimination legally survives the National Labor Relations Act, the history which led to the Act and the aims which infuse it give direction to our inquiry. Congress explicitly disclosed its purposes in declaring the policy which underlies the Act. Its ultimate concern, as well as the source of its power, was "to eliminate the causes of certain substantial obstructions to the free flow of commerce." This vital national purpose was to be accomplished "by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association." # 1. Only thus could workers ensure themselves economic standards consonant with national well-being. Protection of the workers' right to self-organization does not curtail the appropriate sphere of managerial freedom; it furthers the wholesome conduct of business enterprise. "The act," this Court has said, "does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them." But "under cover of that right," the employer may not "intimidate or coerce its employees with respect to their self-organization and representation." When "employers freely recognize the right of their employees to their own organizations and their unrestricted right of representation there will be much less occasion for controversy in respect to the free and appropriate exercise of the right of selection and discharge." *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45, 46. . . . This is so because of the nature of modern industrialism. Labor unions were organized "out of the necessities of the situation. . . . Union was essential to give laborers opportunity to deal on equality with their employer." Such was the view, on behalf of the Court, of Chief Justice Taft, *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184, 209, . . . after his unique practical experience with the causes of industrial unrest as co-chairman of the National War Labor Board. And so the present Act, codifying this long history, leaves the adjustment of industrial relations to the free play of economic forces but seeks to assure that the play of those forces be truly free.

It is no longer disputed that workers cannot be dismissed from employment because of their union affiliations. Is the national interest in industrial peace less affected by discrimination against union activity when men are hired? The contrary is overwhelmingly attested by the

long history of industrial conflicts, the diagnosis of their causes by official investigations, the conviction of public men, industrialists and scholars. Because of the Pullman strike, Congress in the Erdman Act of 1898 prohibited inroads upon the workingman's right of association by discriminatory practices at the point of hiring. Kindred legislation has been put on the statute books of more than half the states. And during the late war the National War Labor Board concluded that discrimination against union men at the time of hiring violated its declared policy that "The right of workers to organize in trade-unions and to bargain collectively . . . shall not be denied, abridged, or interfered with by the employers in any manner whatsoever." Such a policy is an inevitable corollary of the principle of freedom of organization. Discrimination against union labor in the hiring of men is a dam to self-organization at the source of supply. The effect of such discrimination is not confined to the actual denial of employment; it inevitably operates against the whole idea of the legitimacy of organization. In a word, it undermines the principle which, as we have seen, is recognized as basic to the attainment of industrial peace.

These are commonplaces in the history of American industrial relations. But precisely for that reason they must be kept in the forefront in ascertaining the meaning of a major enactment dealing with these relations. To be sure, in outlawing unfair labor practices, Congress did not leave the matter at large. The practices condemned "are strictly limited to those enumerated in section 8," S. Rep. No. 573, 74th Cong., 1st Sess., p. 8. Section 8(3) is the foundation of the Board's determination that in refusing employment to the two men because of their union affiliations Phelps Dodge violated the Act. And so we turn to its provisions that "It shall be an unfair labor practice for an employer . . . by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."

Unlike mathematical symbols, the phrasing of such social legislation as this seldom attains more than approximate precision of definition. That is why all relevant aids are summoned to determine meaning. Of compelling consideration is the fact that words acquire scope and function from the history of events which they summarize. We have seen the close link between a bar to employment because of union affiliation and the opportunities of labor organizations to exist and to prosper. Such an embargo against employment of union labor was notoriously one of the chief obstructions to collective bargaining through self-organization. Indisputably the removal of such obstructions was the driving force behind the enactment of the National Labor Relations Act. The prohibition against "discrimination in regard to hire" must be applied as a

means towards the accomplishment of the main object of the legislation. We are asked to read "hire" as meaning the wages paid to an employee so as to make the statute merely forbid discrimination in one of the terms of men who have secured employment. So to read the statute would do violence to a spontaneous textual reading. . . .

We have already recognized the power of Congress to deny an employer the freedom to discriminate in discharging. *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1. . . . The course of decisions in the Court since *Adair v. United States*, 208 U.S. 161, . . . and *Coppage v. Kansas*, 236 U.S. 1, . . . have completely sapped those cases of their authority. *Pennsylvania R. Co. v. United States Railroad Labor Board*, 261 U.S. 72, . . . ; *Texas & N. O. R. Co. v. Brotherhood of Ry. & S. S. Clerks*, 281 U.S. 548, . . . ; *Virginian R. Co. v. System Federation*, 300 U.S. 515, . . . ; *National Labor Relation Board v. Jones & Laughlin Steel Corp.*, *supra*.

Second. Since the refusal to hire Curtis and Daugherty solely because of their affiliation with the union was an unfair labor practice under # 8(3), the remedial authority of the Board under # 10(c) became operative. Of course it could issue, as it did, an order "to cease and desist from such unfair labor practice" in the future. Did Congress also empower the Board to order the employer to undo the wrong by offering the men discriminated against the opportunity for employment which should not have been denied them?

Reinstatement is the conventional correction for discriminatory discharges. Experience having demonstrated that discrimination in hiring is twin to discrimination in firing, it would indeed be surprising if Congress gave a remedy for the one which it denied for the other. The powers of the Board as well as the restrictions upon it must be drawn from # 10(c), which directs the Board "to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act." It could not be seriously denied that to require discrimination in hiring or firing to be "neutralized" . . . by requiring the discrimination to cease not abstractly but in the concrete victimizing circumstances, is an "affirmative action" which "will effectuate the policies of this act." Therefore, . . . the right to restore to a man employment which was wrongfully denied him could hardly be doubted. Even without such a mandate from Congress this Court compelled reinstatement to enforce the legislative policy against discrimination represented by the Railway Labor Act. . . . Attainment of a great national policy through expert administration in collaboration with limited judicial review must not be confined within narrow canons for equitable relief deemed suitable by chancellors in ordinary private controversies. . . . To differentiate between discrimination in denying em-

ployment and in terminating it, would be a differentiation not only without substance but in defiance of that against which the prohibition of discrimination is directed. . . .

Fifth. As part of its remedial action against the unfair labor practices, the Board ordered that workers who had been denied their employment be made whole for their loss of pay. . . .

Making the workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces. Since only actual losses should be made good, it seems fair that deductions should be made not only for actual earnings by the worker but also for losses which he willfully incurred. . . .

MR. JUSTICE ROBERTS took no part in the case.

MR. JUSTICE MURPHY, with the concurrence of BLACK and DOUGLAS, JJ., dissented in part. . . .

MR. JUSTICE STONE, with the concurrence of MR. CHIEF JUSTICE HUGHES, dissented in part. . . .

Labor Unions and the Anti-Trust Laws

UNITED STATES *v.* HUTCHESON.

Supreme Court of the United States. 1941.

312 U.S. 219.

[Anheuser-Busch, Inc., of St. Louis, contracted with Borsari Tank Corporation for the construction of an additional facility. Among the employees of Anheuser-Busch were members of the United Brotherhood of Carpenters and Joiners of America and of the International Association of Machinists. Conflicting claims of the two unions with regard to the dismantling and the erection of machinery were of long standing. Anheuser-Busch had made agreements with both organizations whereby the Machinists were given the disputed jobs and the Carpenters were to submit all such jobs to arbitration. During the course of the construction of the new facility, representatives of the Carpenters' union, the men under indictment, claimed certain jobs connected therewith. The employer rejected this demand. Thereupon the Carpenters struck against Anheuser-Busch and picketed the plant. They also sent out circular letters requesting union members and their friends to refrain from buying Anheuser-Busch beer. They further published this request in their official organ. The United States charged that these activities constituted a

criminal combination and conspiracy in violation of the Sherman Anti-Trust Law.]

MR. JUSTICE FRANKFURTER delivered the opinion of the Court. . . .

(W)hether trade union conduct constitutes a violation of the Sherman Law is to be determined only by reading the Sherman Law and # 20 of the Clayton Act and the Norris-LaGuardia Act as a harmonizing text of outlawry of labor conduct.

Were then the acts charged against the defendants prohibited or permitted by these three interlacing statutes? If the facts laid in the indictment come within the conduct enumerated in #20 of the Clayton Act they do not constitute a crime within the general terms of the Sherman Law because of the explicit command of that section that such conduct shall not be "considered or held to be violations of any law of the United States." There is nothing remotely within the terms of # 20 that differentiates between trade union conduct directed against an employer because of a controversy arising in the relation between employer and employee, as such, and conduct similarly directed but ultimately due to an internecine struggle between two unions seeking the favor of the same employer. . . .

In so far as the Clayton Act is concerned, we must therefore dispose of this case as though we had before us precisely the same conduct on the part of the defendants in pressing claims against Anheuser-Busch for increased wages, or shorter hours, or other elements of what are called working conditions. The fact that what was done was done in a competition for jobs against the Machinists rather than against, let us say, a company union is a differentiation which Congress has not put into the federal legislation and which therefore we cannot write into it.

It is at once apparent that the acts with which the defendants are charged are the kind of acts protected by # 20 of the Clayton Act. The refusal of the Carpenters to work for Anheuser-Busch or on construction work being done for it and the peaceful attempt to get members of other unions similarly to refuse to work, are plainly within the free scope accorded to workers by # 20 for "terminating any relation of employment," or "ceasing to perform any work or labor," or "recommending, advising, or persuading others by peaceful means so to do." The picketing of Anheuser-Busch premises with signs to indicate that Anheuser-Busch was unfair to organized labor, a familiar practice in these situations, comes within the language "attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working." Finally, the

recommendation to union members and their friends not to buy or use the product of Anheuser-Busch is explicitly covered by "ceasing to patronize . . . any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do."

Clearly, then, the facts here charged constitute lawful conduct under the Clayton Act unless the defendants cannot invoke that act because outsiders to the immediate dispute also shared in the conduct. But we need not determine whether the conduct is legal within the restrictions which *Duplex Co. v. Deering* (254 U.S. 443) gave to the immunities of # 20 of the Clayton Act. Congress in the Norris-LaGuardia Act has expressed the public policy of the United States and defined its conception of a "labor dispute" in terms that no longer leave room for doubt. . . . Such a dispute, # 13(c) provides, "includes any controversy concerning terms and conditions of employment, . . . regardless of whether or not the disputants stand in the proximate relation of employer and employee." And under # 13(b) a person is "participating or interested in a labor dispute" if he "is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein. . . ."

To be sure, Congress expressed this national policy and determined the bounds of a labor dispute in an act explicitly dealing with the further withdrawal of injunctions in labor controversies. But to argue, as it was urged before us, that the *Duplex* case still governs for purposes of a criminal prosecution is to say that that which on the equity side of the court is allowable conduct may in a criminal proceeding become the road to prison. . . . That is not the way to read the will of Congress, particularly when expressed by a statute which, as we have already indicated, is practically and historically one of a series of enactments touching one of the most sensitive national problems. . . .

The relation of the Norris-LaGuardia Act to the Clayton Act is not that of a tightly drawn amendment to a technically phrased tax provision. The underlying aim of the Norris-LaGuardia Act was to restore the broad purpose which Congress thought it had formulated in the Clayton Act but which was frustrated, so Congress believed, by unduly restrictive judicial construction. . . . The Norris-LaGuardia Act was a disapproval of *Duplex Printing Press Co. v. Deering*, *supra*, and *Bedford Cut Stone Co. v. Journeyman Stone Cutters Association*, 274 U.S. 37. . . .

MR. JUSTICE MURPHY took no part in the disposition of this case.

MR. JUSTICE STONE, concurring:

As I think it clear that the indictment fails to charge an offense under the Sherman Act, . . . I find no occasion to consider the impact of the

Norris-LaGuardia Act on the definition of participants in a labor dispute, in the Clayton Act, as construed by this Court in *Duplex Printing Press Co. v. Deering*, 254 U.S. 443—an application of the Norris-LaGuardia Act which is not free from doubt and which some of my brethren sharply challenge. . . .

MR. JUSTICE ROBERTS dissented. . . .

THE CHIEF JUSTICE joins in this opinion.⁴

ALLEN BRADLEY CO. v. LOCAL UNION NO. 3, INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS.

Supreme Court of the United States. 1945.
325 U.S. 797.

MR. JUSTICE BLACK delivered the opinion of the Court.

The question presented is whether it is a violation of the Sherman Anti-trust Act for labor unions and their members, prompted by a desire to get and hold jobs for themselves at good wages and under high working standards, to combine with employers and with manufacturers of goods to restrain competition in, and to monopolize the marketing of such goods. . . .

Petitioners are manufacturers of electrical equipment. Their places of manufacture are outside of New York City, and most of them are outside of New York State as well. They have brought this action because of their desire to sell their products in New York City, a market area that has been closed to them through the activities of respondents and others.

Respondents are a labor union. The union has jurisdiction only over the metropolitan area of New York City. It is therefore impossible for the union to enter into a collective bargaining agreement with petitioners. . . .

Some of the members of respondent union work for manufacturers who produce electrical equipment similar to that made by petitioners; other members of respondent union are employed by contractors and work on the installation of electrical equipment, rather than in its production.

⁴ Since the Court consisted at this time of eight justices, Mr. Justice McReynolds having retired on February 1, the majority *view* is that of four members of the Court.—Ed.

The union's consistent aim for many years has been to expand its membership, to obtain shorter hours and increased wages, and to enlarge employment opportunities for its members. To achieve this latter goal the union realized that local manufacturers must have the widest possible outlets for their product. The union therefore waged aggressive campaigns to obtain closed-shop agreements with all local electrical equipment manufacturers and contractors. . . . Under these agreements, contractors were obligated to purchase equipment from none but local manufacturers who also had closed-shop agreements with Local No. 3; manufacturers obligated themselves to confine their New York City sales to contractors employing the Local's members. In the course of time, this type of individual employer-employee agreement expanded into industry-wide understandings, looking not merely to terms and conditions of employment but also to price and market control. Agencies were set up composed of representatives of all three groups to boycott recalcitrant local contractors and manufacturers and to bar from the area equipment manufactured outside its boundaries. The combination among the three groups, union, contractors, and manufacturers, became highly successful from the standpoint of all of them. The business of New York City manufacturers had a phenomenal growth, thereby multiplying the jobs available for the Local's members. Wages went up, hours were shortened, and the New York electrical equipment prices soared, to the decided financial profit of local contractors and manufacturers. . . . Interstate sale of various types of electrical equipment has, by this powerful combination, been wholly suppressed.

Quite obviously, this combination of business men has violated both secs. 1 and 2 of the Sherman Act, unless its conduct is immunized by the participation of the union. . . . *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 512-513. Our problem in this case is therefore a very narrow one—do labor unions violate the Sherman Act when, in order to further their own interests as wage earners, they aid and abet business men to do the precise things which the Act prohibits?

The Sherman Act as originally passed contained no language exempting any labor union activities. Sharp controversy soon arose as to whether the Act applied to unions. . . .

To amend, supplement and strengthen the Sherman Act against monopolistic business practices, and in response to the complaints of the unions against injunctions and application of the Act to them, Congress in 1914 passed the Clayton Act. . . . That this bill was intended to make it all the more certain that competition should be the rule in all commercial transactions is clear from its language and history.

In its treatment of labor unions and their activities the Clayton Act pointed in an opposite direction. Congress in that Act responded to the

prolonged complaints concerning application of the Sherman law to labor groups. . . .

This Court later declined to interpret the Clayton Act as manifesting a congressional purpose wholly to exempt labor unions from the Sherman Act. *Duplex Co. v. Deering*, 254 U.S. 443; *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Assn.*, 274 U.S. 37. In those cases labor unions had engaged in a secondary boycott; they had boycotted dealers, by whom the union members were not employed, because those dealers insisted on selling goods produced by the employers with whom the unions had an existing controversy over terms and conditions of employment. This Court held that the Clayton Act exempted labor union activities only insofar as those activities were directed against the employees' immediate employers and that controversies over the sale of goods by other dealers did not constitute "labor disputes" within the meaning of the Clayton Act.

Again the unions went to Congress. . . . Congress adopted their viewpoint, at least in large part, and in order to escape the effect of the *Duplex* and *Bedford* decisions, passed the Norris-LaGuardia Act. . . . That Act greatly broadened the meaning this Court had attributed to the words "labor dispute," . . . and emphasized the public importance under modern economic conditions of protecting the rights of employees to organize into unions. . . . This congressional purpose found further expression in the Wagner Act. . . .

We said in *Apex Hosiery Co. v. Leader*, *supra*, 488, that labor unions are still subject to the Sherman Act to "some extent not defined." The opinion in that case, however, went on to explain that the Sherman Act "was enacted in the era of 'trusts' and of 'combinations' of businesses and of capital organized and directed to control of the market by suppression of competition . . . ; that its purpose was to protect consumers from monopoly prices, and not to serve as a comprehensive code to regulate and police all kinds and types of interruptions and obstructions to the flow of trade. . . .

United States v. Hutcheson, 312 U.S. 219, declared that the Sherman, Clayton and Norris-LaGuardia Acts must be jointly considered in arriving at a conclusion as to whether labor union activities run counter to the Anti-trust legislation. . . . That decision held that the doctrine of the *Duplex* and *Bedford* cases was inconsistent with the congressional policy set out in the three "interlacing statutes."

The result of all this is that we have two declared congressional policies which it is our responsibility to try to reconcile. The one seeks to preserve a competitive business economy; the other to preserve the rights of labor to organize to better its conditions through the agency of collective bargaining. We must determine here how far Congress intended

activities under one of these policies to neutralize the results envisioned by the other.

Aside from the fact that the labor union here acted in combination with the contractors and manufacturers, the means it adopted to contribute to the combination's purpose fall squarely within the "specified acts" declared not to be violations of federal law. . . . Consequently, under our holdings in the *Hutcheson* case and other cases which followed it, had there been no union-contractor-manufacturer combination the union's actions here, coming as they did within the exemptions of the Clayton and Norris-LaGuardia Acts, would not have been violations of the Sherman Act. We pass to the question of whether unions can with impunity aid and abet business men who are violating the Act. . . . See *United States v. Hutcheson*, *supra*, 236.

We have been pointed to no language in any act of Congress or in its reports or debates, nor have we found any, which indicates that it was ever suggested, considered, or legislatively determined that labor unions should be granted an immunity such as is sought in the present case. It has been argued that this immunity can be inferred from a union's right to make bargaining agreements with its employer. Since union members can without violating the Sherman Act strike to enforce a union boycott of goods, it is said that they may settle the strike by getting their employers to agree to refuse to buy the goods. . . . We may assume that such an agreement standing alone would not have violated the Sherman Act. But it did not stand alone. It was but one element in a far larger program in which contractors and manufacturers united with one another to monopolize all the business in New York City. . . . It is true that victory of the union in its disputes, even had the union acted alone, might have added to the cost of goods, or might have resulted in individual refusals of all of their employers to buy electrical equipment not made by Local No. 3. So far as the union might have achieved this result acting alone, it would have been the natural consequence of labor union activities exempted by the Clayton Act from the coverage of the Sherman Act. *Apex Hosiery Co. v. Leader*, *supra*, 503. But when the unions participated with a combination of business men who had complete power to eliminate all competition among themselves and to prevent all competition from others, a situation was created not included within the exemptions of the Clayton and Norris-LaGuardia Acts.

It must be remembered that the exemptions granted the unions were special exceptions to a general legislative plan. The primary object of all the Anti-trust legislation has been to preserve business competition and to proscribe business monopoly. . . . For if business groups, by combining with labor unions, can fix prices and divide up markets, it was

little more than a futile gesture for Congress to prohibit price fixing by business groups themselves. . . .

Our holding means that the same labor union activities may or may not be in violation of the Sherman Act, depending upon whether the union acts alone or in combination with business groups. This, it is argued, brings about a wholly undesirable result—one which leaves labor unions free to engage in conduct which restrains trade. But the desirability of such an exemption of labor unions is a question for the determination of Congress. . . . Thus, these congressionally permitted union activities may restrain trade in and of themselves. There is no denying the fact that many of them do so, both directly and indirectly. . . . There is, however, one line which we can draw with assurance that we follow the congressional purpose. We know that Congress feared the concentrated power of business organizations to dominate markets and prices. It intended to outlaw business monopolies. A business monopoly is no less such because a union participates, and such participation is a violation of the Act. . . .

MR. JUSTICE ROBERTS, dissenting. . . .

MR. JUSTICE MURPHY, dissenting. . . .

HUNT v. CRUMBOCH.

Supreme Court of the United States. 1945.
325 U.S. 821.

MR. JUSTICE BLACK delivered the opinion of the Court.

The question here is whether an organization of laboring men violated the Sherman Act . . . by refusing to admit to membership petitioner's employees, and by refusing to sell their services to petitioner, thereby making it impossible for petitioner to continue in business.

For about fourteen years prior to 1939, the petitioner, a business partnership engaged in motor trucking, carried freight under a contract with the Great Atlantic & Pacific Tea Co. (A & P). Eighty-five per cent of the merchandise thus hauled by petitioner was interstate, from and to Philadelphia, Pennsylvania. The respondent union, composed of drivers and helpers, was affiliated with other A. F. of L. unions whose members worked at loading and hauling of freight by motor truck. In 1937, the respondent union called a strike of the truckers and haulers of A & P in Philadelphia for the purpose of enforcing a closed shop. The petitioner, refusing to unionize its business, attempted to operate during the strike.

Much violence occurred. One of the union men was killed near union headquarters, and a member of the petitioner partnership was tried for the homicide and acquitted. A & P and the union entered into a closed-shop agreement, whereupon all contract haulers working for A & P, including the petitioner, were notified that their employees must join and become members of the union. All of the other contract haulers except petitioner either joined the union or made closed-shop agreements with it. The union, however, refused to negotiate with the petitioner, and declined to admit any of its employees to membership. Although petitioner's services had been satisfactory, A & P, at the union's instigation, cancelled its contract with petitioner in accordance with the obligations of its closed-shop agreement with the union. Later, the petitioner obtained a contract with a different company, but again at the union's instigation, and upon the consummation of a closed-shop contract by that company with the union, petitioner lost that contract and business. Because of the union's refusal to negotiate with the petitioner and to accept petitioner's employees as members, the petitioner was unable to obtain any further hauling contracts in Philadelphia. The elimination of the petitioner's service did not in any manner affect the interstate operations of A & P or other companies.

The petitioner then instituted this suit in a federal district court against respondents praying for an injunction and asking for treble damages. . . .

The "destruction" of petitioner's business resulted from the fact that the union members, acting in concert, refused to accept employment with the petitioner, and refused to admit to their association anyone who worked for petitioner. The petitioner's loss of business is therefore analogous to the case of a manufacturer selling goods in interstate commerce who fails in business because union members refuse to work for him. Had a group of petitioner's business competitors conspired and combined to suppress petitioner's business by refusing to sell goods and services to it, such a combination would have violated the Sherman Act. . . . A labor union which aided and abetted such a group would have been equally guilty. . . . The only combination here, however, was one of workers alone and what they refused to sell petitioner was their labor.

It is not a violation of the Sherman Act for laborers in combination to refuse to work. They can sell or not sell their labor as they please, and upon such terms and conditions as they choose, without infringing the Anti-trust laws. *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 502-503. A worker is privileged under congressional enactments, acting either alone or in concert with his fellow workers, to associate or to decline to associate with other workers, to accept, refuse to accept, or to terminate a relationship of employment, and his labor is not to be treated as "a

commodity or article of commerce." Clayton Act . . . Norris-LaGuardia Act . . . ; see also *American Steel Foundries v. Tri-City Council*, 257 U.S. 184, 209. It was the exercise of these rights that created the situation which caused the petitioner to lose its hauling contracts and its business.

It is argued that their exercise falls within the condemnation of the Sherman Act, because the union members' refusal to accept employment was due to personal antagonism against the petitioner arising out of the killing of a union man. But Congress in the Sherman Act and the legislation which followed it manifested no purpose to make *any* kind of refusal to accept personal employment a violation of the Anti-trust laws. Such an application of those laws would be a complete departure from their spirit and purpose. . . .

It is further argued that the concerted refusal of union members to work for petitioner must be held to violate the Sherman Act because petitioner's business was "an instrumentality of interstate commerce." . . . Acceptance of this contention would imply that workers do not possess the same privileges to choose or reject employment with interstate carriers as with other businesses. The entire history of congressional legislation, including the Railway Labor Act . . . belies this argument. . . .

The controversy in the instant case . . . involves nothing more than a dispute over employment, and the withholding of labor services. It cannot therefore be said to violate the Sherman Act. . . . The Act does not purport to afford remedies for all torts committed by or against persons engaged in interstate commerce. . . .

MR. JUSTICE ROBERTS. . . .

The issue presented in this case, in my judgment, lies wholly outside and beyond any precedent to be found in the decisions of this court, and certainly so as to *Apex Hosiery Co. v. Leader*, 310 U.S. 469, on which the court relies.

There was a labor dispute as to unionization between motor carriers and the union representing employ  s. The record demonstrates that the dispute involved in this case was no part of that labor dispute but an off-shoot of it; not involving wages, unionization, closed shop, hours or other conditions of work.

The union, in an effort to organize the employ  s of motor carriers, resorted to a strike. The petitioners resisted unionization. During the ensuing disorder a man was shot. The union officials attributed the killing to one of the petitioners. In fact he was acquitted by a jury. The respondents decided to punish him. . . . The union determined to punish petitioners by refusing to sign a contract with them and by for-

bidding the members of the union to work for them. There is no suggestion in the record that they did so because of any labor conditions or considerations, or that petitioners' men would not join the union, or that union men would not work with them, if they did join. It is hardly an accurate description of their attitude to say that the union men decided not to sell their labor to the petitioners. They intended to drive petitioners out of business as interstate motor carriers, and they succeeded in so doing.

The petitioners, for fourteen years, had been carriers of merchandise in interstate commerce. The union compelled A. & P., their principal patron, to break its contract with them and to discharge them from further serving it. The union frustrated efforts of petitioners to obtain contracts with other shippers.

. . . . Thus they reduced competition between interstate carriers by eliminating one competitor from the field. The conspiracy, therefore, was clearly within the denunciation of the Sherman Act as one intended, and effective, to lessen competition in commerce, and not within any immunity conferred by the Clayton Act.

The CHIEF JUSTICE, MR. JUSTICE FRANKFURTER, and MR. JUSTICE JACKSON join in this opinion.

MR. JUSTICE JACKSON, dissenting. . . .

We say in the *Allen Bradley* case that, since a labor dispute existed, the refusal of the union to work would not have violated the Sherman Act if it had acted alone. . . . The social interest in allowing workers to better their condition by their combined bargaining power was thought to outweigh the otherwise undesirable restriction on competition which all successful union activity necessarily entails. But there is no social interest served by union activities which are directed not to the advantage of union members but merely to capricious and retaliatory misuse of the power which unions have simply to impose their will on an employer.

The *Apex* case says nothing of the direct destruction of competition in interstate commerce, as an end in itself, which the respondent union here effectuated. . . .

With this decision, the labor movement has come full circle. . . . This Court now sustains the claim of a union to the right to deny participation in the economic world to an employer simply because the union dislikes him. This Court permits to employees the same arbitrary dominance over the economic sphere which they control that labor so long, so bitterly and so rightly asserted should belong to no man. . . .

THE CHIEF JUSTICE and MR. JUSTICE FRANKFURTER join in this opinion.

Social Security

STEWART MACHINE CO. v. DAVIS.

Supreme Court of the United States. 1937.
301 U.S. 548.

MR. JUSTICE CARDOZO delivered the opinion of the Court.

The validity of the tax imposed by the Social Security Act (Act of August 14, 1935, c. 531, 49 Stat. 620, Titles IX and III) on employers of eight or more is here to be determined.

Petitioner, an Alabama corporation, paid a tax in accordance with the statute, filed a claim for refund with the Commissioner of Internal Revenue, and sued to recover the payment (\$46.14), asserting a conflict between the statute and the Constitution of the United States. . . .

The assault on the statute proceeds on an extended front. Its assailants take the ground that the tax is not an excise; that it is not uniform throughout the United States as excises are required to be; that its exceptions are so many and arbitrary as to violate the Fifth Amendment; that its purpose was not revenue, but an unlawful invasion of the reserved powers of the states; and that the states in submitting to it have yielded to coercion and have abandoned governmental functions which they are not permitted to surrender.

The objections will be considered seriatim with such further explanation as may be necessary to make their meaning clear.

First. The tax, which is described in the statute as an excise, is laid with uniformity throughout the United States as a duty, an impost or an excise upon the relation of employment. . . .

. . . . An excise is not limited to vocations or activities that may be prohibited altogether. It is not limited to those that are the outcome of a franchise. It extends to vocations or activities pursued as of common right. What the individual does in the operation of a business is amenable to taxation just as much as what he owns, at all events if the classification is not tyrannical or arbitrary. . . . Indeed, ownership itself, as we had occasion to point out the other day, is only a bundle of rights and privileges invested with a single name. *Henneford v. Silas Mason Co.*, 300 U.S. 577. "A state is at liberty, if it pleases, to tax them all collectively, or to separate the faggots and lay the charge distributively." *Ibid.* Employment is a business relation, if not itself a business. It is a relation without which business could seldom be carried on effectively. The power to tax the activities and relations that constitute a calling consid-

ered as a unit is the power to tax any of them. The whole includes the parts. . . .

The subject matter of taxation open to the power of the Congress is as comprehensive as that open to the power of the states, though the method of apportionment may at times be different. . . . If the tax is a direct one, it shall be apportioned according to the census or enumeration. If it is a duty, impost or excise, it shall be uniform throughout the United States. Together, these classes include every form of tax appropriate to sovereignty. . . . Whether the tax is to be classified as an "excise" is in truth not of critical importance. If not that, it is an "impost," or a "duty." A capitation or other "direct" tax it certainly is not. "Although there have been from time to time intimations that there might be some tax which was not a direct tax nor included under the words 'duties, imposts and excises,' such a tax for more than one hundred years of national existence has as yet remained undiscovered, notwithstanding the stress of particular circumstances has invited thorough investigation into sources of powers." *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 557. There is no departure from that thought in later cases, but rather a new emphasis of it. . . .

Second. The excise is not invalid under the provisions of the Fifth Amendment by force of its exemptions.

The statute does not apply . . . to employers of less than eight. It does not apply to agricultural labor, or domestic service in a private home or to some other classes of less importance. Petitioner contends that the effect of these restrictions is an arbitrary discrimination vitiating the tax.

The Fifth Amendment unlike the Fourteenth has no equal protection clause. . . . But even the states, though subject to such a clause, are not confined to a formula of rigid uniformity in framing measures of taxation. . . . They may tax some kinds of property at one rate, and others at another, and exempt others altogether. . . . They may lay an excise on the operations of a particular kind of business, and exempt some other kind of business closely akin thereto. . . . If this latitude of judgment is lawful for the states, it is lawful, a fortiori, in legislation by the Congress, which is subject to restraints less narrow and confining. . . .

The classifications and exemptions directed by the statute now in controversy have support in considerations of policy and practical convenience that cannot be condemned as arbitrary. The classifications and exemptions would therefore be upheld if they had been adopted by a state and the provisions of the Fourteenth Amendment were invoked to annul them. . . .

Third. The excise is not void as involving the coercion of the States

(*sic*) in contravention of the Tenth Amendment or of restrictions implicit in our federal form of government.

The proceeds of the excise when collected are paid into the Treasury at Washington, and thereafter are subject to appropriation like public moneys generally. . . . No presumption can be indulged that they will be misapplied or wasted. Even if they were collected in the hope or expectation that some other and collateral good would be furthered as an incident, that without more would not make the act invalid. . . . This indeed is hardly questioned. The case for the petitioner is built on the contention that here an ulterior aim is wrought into the very structure of the act, and what is even more important that the aim is not only ulterior, but essentially unlawful. In particular, the 90 per cent credit is relied upon as supporting that conclusion. But before the statute succumbs to an assault upon these lines, two propositions must be made out by an assailant. . . . There must be a showing in the first place that separated from the credit the revenue provisions are incapable of standing by themselves. There must be a showing in the second place that the tax and the credit in combination are weapons of coercion, destroying or impairing the autonomy of the states. The truth of each proposition being essential to the success of the assault, we pass for convenience to a consideration of the second, without pausing to inquire whether there has been a demonstration of the first.

To draw the line intelligently between duress and inducement there is need to remind ourselves of facts as to the problem of unemployment that are now matters of common knowledge. . . . The relevant statistics are gathered in the brief of counsel for the Government. Of the many available figures a few only will be mentioned. During the years 1929 to 1936, when the country was passing through a cyclical depression, the number of the unemployed mounted to unprecedented heights. Often the average was more than 10 million; at times a peak was attained of 16 million or more. Disaster to the breadwinner meant disaster to dependents. Accordingly the roll of the unemployed, itself formidable enough, was only a partial roll of the destitute or needy. The fact developed quickly that the states were unable to give the requisite relief. The problem had become national in area and dimensions. There was need of help from the nation if the people were not to starve. It is too late today for the argument to be heard with tolerance that in a crisis so extreme the use of the moneys of the nation to relieve the unemployed and their dependents is a use for any purpose narrower than the promotion of the general welfare. The nation responded to the call of the distressed. Between January 1, 1933, and July 1, 1936, the states (according to statistics submitted by the Government) incurred obligations of \$689,291,802 for emergency relief; local subdivisions an

additional \$775,675,366. In the same period the obligations for emergency relief incurred by the national government were \$2,929,307,125, or twice the obligations of states and local agencies combined. According to the President's budget message for the fiscal year 1938, the national government expended for public works and unemployment relief for the three fiscal years of 1934, 1935, and 1936, the stupendous total of \$8,681,000,000. The *parens patriae* has many reasons—fiscal and economic as well as social and moral—for planning to mitigate disasters that bring these burdens in their train.

In the presence of this urgent need for some remedial expedient, the question is to be answered whether the expedient adopted has overlept the bounds of power. The assailants of the statute say that its dominant end and aim is to drive the state legislatures under the whip of economic pressure into the enactment of unemployment compensation laws at the bidding of the central government. Supporters of the statute say that its operation is not constraint, but the creation of a larger freedom, the states and the nation joining in a coöperative endeavor to avert a common evil. Before Congress acted, unemployment compensation insurance was still, for the most part, a project and no more. Wisconsin was the pioneer. Her statute was adopted in 1931. At times bills for such insurance were introduced elsewhere, but they did not reach the stage of law. In 1935, four states (California, Massachusetts, New Hampshire and New York) passed unemployment laws on the eve of the adoption of the Social Security Act, and two others did likewise after the federal act and later in the year. The statutes differed to some extent in type, but were directed to a common end. In 1936, twenty-eight states fell in line, and eight more the present year. But if states had been holding back before the passage of the federal law, inaction was not owing, for the most part, to the lack of sympathetic interest. Many held back through alarm lest, in laying such a toll upon their industries, they would place themselves in a position of economic disadvantage as compared with neighbors or competitors. . . . Two consequences ensued. One was that the freedom of a state to contribute its fair share to the solution of a national problem was paralyzed by fear. The other was that in so far as there was failure by the states to contribute relief according to the measure of their capacity, a disproportionate burden, and a mountainous one, was laid upon the resources of the Government of the nation.

The Social Security Act is an attempt to find a method by which all these public agencies may work together to a common end. Every dollar of the new taxes will continue in all likelihood to be used and needed by the nation as long as states are unwilling, whether through timidity or for other motives, to do what can be done at home. . . .

On the other hand fulfilment of the home duty will be lightened and encouraged by crediting the taxpayer upon his account with the Treasury of the nation to the extent that his contributions under the laws of the locality have simplified or diminished the problem of relief and the probable demand upon the resources of the fisc. . . .

Who then is coerced through the operation of this statute? Not the taxpayer. He pays in fulfilment of the mandate of the local legislature. Not the state. Even now she does not offer a suggestion that in passing the unemployment law she was affected by duress. . . . For all that appears she is satisfied with her choice, and would be sorely disappointed if it were now to be annulled. The difficulty with the petitioner's contention is that it confuses motive with coercion. "Every tax is in some measure regulatory. To some extent it interposes an economic impediment to the activity taxed as compared with others not taxed." *Sonzinsky v. United States*, (300 U.S. 506). In like manner every rebate from a tax when conditioned upon conduct is in some measure a temptation. But to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties. The outcome of such a doctrine is the acceptance of a philosophical determinism by which choice becomes impossible. Till now the law has been guided by a robust common sense which assumes the freedom of the will as a working hypothesis in the solution of its problems. The wisdom of the hypothesis has illustration in this case. Nothing in the case suggests the exertion of a power akin to undue influence, if we assume that such a concept can ever be applied with fitness to the relations between state and nation. Even on that assumption the location of the point at which pressure turns into compulsion, and ceases to be inducement, would be a question of degree,—at times, perhaps, of fact. The point had not been reached when Alabama made her choice. We cannot say that she was acting, not of her unfettered will, but under the strain of a persuasion equivalent to undue influence, when she chose to have relief administered under laws of her own making, by agents of her own selection, instead of under federal law, administered by federal officers, with all the ensuing evils, at least to many minds, of federal patronage and power. There would be a strange irony, indeed, if her choice were now to be annulled on the basis of an assumed duress in the enactment of a statute which her courts have accepted as a true expression of her will. . . . We think the choice must stand. . . .

United States v. Butler, [297 U.S. 1], is cited by petitioner as a decision to the contrary. There a tax was imposed on processors of farm products, the proceeds to be paid to farmers who would reduce their acreage and crops under agreements with the Secretary of Agriculture, the plan of the act being to increase the prices of certain farm products

by decreasing the quantities produced. The court held (1) that the so-called tax was not a true one (pp. 56, 61), the proceeds being earmarked for the benefit of farmers complying with the prescribed conditions, (2) that there was an attempt to regulate production without the consent of the state in which production was affected, and (3) that the payments to farmers were coupled with coercive contracts (p. 73), unlawful in their aim and oppressive in their consequences. The decision was by a divided court, a minority taking the view that the objections were untenable. None of them is applicable to the situation here developed.

(a) The proceeds of the tax in controversy are not earmarked for a special group.

(b) The unemployment compensation law which is a condition of the credit has had the approval of the state and could not be law without it.

(c) The condition is not linked to an irrevocable agreement, for the state at its pleasure may repeal its unemployment law, . . . terminate the credit, and place itself where it was before the credit was accepted.

(d) The condition is not directed to the attainment of an unlawful end, but to an end, the relief of unemployment, for which nation and state may lawfully cooperate.

Fourth. The statute does not call for a surrender by the states of powers essential to their quasi-sovereign existence.

Argument to the contrary has its source in two sections of the act. One section . . . defines the minimum criteria to which a state compensation system is required to conform if it is to be accepted by the Board as the basis for a credit. The other section . . . rounds out the requirement with complementary rights and duties. Not all the criteria or their incidents are challenged as unlawful. We will speak of them first generally, and then more specifically in so far as they are questioned.

A credit to taxpayers for payments made to a State under a state unemployment law will manifestly be futile in the absence of some assurance that the law leading to the credit is in truth what it professes to be. An unemployment law framed in such a way that the unemployed who look to it will be deprived of reasonable protection is one in name and nothing more. What is basic and essential may be assured by suitable conditions. The terms embodied in these sections are directed to that end. A wide range of judgment is given to the several states as to the particular type of statute to be spread upon their books. For anything to the contrary in the provisions of this act they may use the pooled unemployment form, which is in effect with variations in Alabama, California, Michigan, New York, and elsewhere. They may establish a system of merit ratings applicable at once or to go into effect

later on the basis of subsequent experience. . . . They may provide for employee contributions as in Alabama and California, or put the entire burden upon the employer as in New York. They may choose a system of unemployment reserve accounts by which an employer is permitted after his reserve has accumulated to contribute at a reduced rate or even not at all. This is the system which had its origin in Wisconsin. What they may not do, if they would earn the credit, is to depart from those standards which in the judgment of Congress are to be ranked as fundamental. Even if opinion may differ as to the fundamental quality of one or more of the conditions, the difference will not avail to vitiate the statute. In determining essentials Congress must have the benefit of a fair margin of discretion. One cannot say with reason that this margin has been exceeded, or that the basic standards have been determined in any arbitrary fashion. In the event that some particular condition shall be found to be too uncertain to be capable of enforcement, it may be severed from the others, and what is left will still be valid.

We are to keep in mind steadily that the conditions to be approved by the Board as the basis for a credit are not provisions of a contract, but terms of a statute, which may be altered or repealed. . . . The state does not bind itself to keep the law in force. It does not even bind itself that the moneys paid into the federal fund will be kept there indefinitely or for any stated time. On the contrary, the Secretary of the Treasury will honor a requisition for the whole or any part of the deposit in the fund whenever one is made by the appropriate officials. The only consequence of the repeal or excessive amendment of the statute, or the expenditure of the money, when requisitioned, for other than compensation uses or administrative expenses, is that approval of the law will end, and with it the allowance of a credit, upon notice to the state agency and an opportunity for hearing. . . .

These basic considerations are in truth a solvent of the problem. Subjected to their test, the several objections on the score of abdication are found to be unreal. . . .

Finally and chiefly, abdication is supposed to follow from # 904 of the statute and the parts of # 903 that are complementary thereto. . . . By these the Secretary of the Treasury is authorized and directed to receive and hold in the Unemployment Trust Fund all moneys deposited therein by a state agency for a state unemployment fund and to invest in obligations of the United States such portion of the Fund as is not in his judgment required to meet current withdrawals. We are told that Alabama in consenting to that deposit has renounced the plenitude of power inherent in her statehood.

The same pervasive misconception is in evidence again. All that the state has done is to say in effect through the enactment of a statute

that her agents shall be authorized to deposit the unemployment tax receipts in the Treasury at Washington. . . . The statute may be repealed. . . . The consent may be revoked. The deposits may be withdrawn. The moment the state commission gives notice to the depositary that it would like the moneys back, the Treasurer will return them. To find state destruction there is to find it almost anywhere. With nearly as much reason one might say that a state abdicates its functions when it places the state moneys on deposit in a national bank. . . .

The inference of abdication thus dissolves in thinnest air when the deposit is conceived of as dependent upon a statutory consent, and not upon a contract effective to create a duty. By this we do not intimate that the conclusion would be different if a contract were discovered. Even sovereigns may contract without derogating from their sovereignty. . . .

Fifth. Title III of the act is separable from Title IX, and its validity is not at issue. . . .

[MR. JUSTICE McREYNOLDS, dissenting]. . . .

[MR. JUSTICE SUTHERLAND, with whom is joined MR. JUSTICE VAN DEVANTER, dissenting]. . . .

[MR. JUSTICE BUTLER, dissenting]. . . .

The Regulation of Agriculture

UNITED STATES v. ROCK ROYAL CO-OPERATIVE, INC., ET AL.

Supreme Court of the United States. 1939.
307 U.S. 533.

MR. JUSTICE REED delivered the opinion of the Court.

These appeals involve the validity of Order No. 27 of the Secretary of Agriculture, issued under the Agricultural Marketing Agreement Act of 1937, [50 Stat. 246,] regulating the handling of milk in the New York metropolitan area. . . .

The Statute. The controversy revolves almost entirely around Order No. 27. Back of the Order is the statute under which it was issued, . . . which reenacted and amended certain provisions of the Agricultural Adjustment Act [48 Stat. 31, as amended, 49 Stat. 750]. As its name implies, it was aimed at assisting in the marketing of agricultural commodities.

By Section 1 it is declared that "the disruption of the orderly exchange of commodities in interstate commerce impairs the purchasing power of farmers" thus destroying the value of agricultural assets to the detriment of the national public interest. This interference is declared to "burden and obstruct the normal channels of interstate commerce."

By Section 2 it is declared to be the policy of Congress, through the exercise of the powers conferred upon the Secretary of Agriculture, "To establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period. . . ."

[Then follows a summary of Section 8, which provides for the fixing of a base period and for the voluntary making of marketing agreements. The opinion proceeds:]

Notwithstanding the refusal or failure of handlers to sign a marketing agreement relating to such commodity, the Secretary of Agriculture, with the approval of the President, may issue an order without the adoption of an agreement if he determines that the refusal or failure of the handlers to sign a marketing agreement tends to prevent the effectuation of the declared policy with respect to the commodity and that the issuance of the order is the only practical means of advancing the interest of the producers. In such a case the order must be approved or favored by two-thirds of the producers in number or volume who have been engaged, during a representative period, in the production for market of the commodity within the production area or two-thirds of those engaged in the production of the commodity for sale in the marketing area specified in the marketing agreement or order. . . .

Section 8c(15) provides for administrative review by the Secretary on petition of a handler objecting to any provision as not in accordance with law. . . .

The Problem.— . . . It is generally recognized that the chief cause of fluctuating prices and supplies is the existence of a normal surplus which is necessary to furnish an adequate amount for peak periods of consumption. This results in an excess of production during the troughs of demand. As milk is highly perishable, a fertile field for the growth of bacteria, and yet an essential item of diet, it is most desirable to have an adequate production under close sanitary supervision to meet the constantly varying needs. . . . More than sixty thousand dairies located in the states of New York, Connecticut, Massachusetts, Maryland, New Jersey, Pennsylvania and Vermont hold certificates of inspection from the Department of Health of the City of New York. More than five hundred receiving plants similarly scattered have been approved for

the receiving and shipping of grades A and B milk. Since all milk produced cannot find a ready market as fluid milk in flush periods, the surplus must move into cream, butter, cheese, milk powder and other more or less nonperishable products. Since these manufactures are in competition with all similar dairy products, the prices for the milk absorbed into manufacturing processes must necessarily meet the competition of low-cost production areas far removed from the metropolitan centers. . . . It is obvious that the marketing of fluid milk in New York has contacts at least with the entire national dairy industry. The approval of dairies by the Department of Health of New York City, as a condition for the sale of their fluid milk in the metropolitan area, isolates from this general competition a well recognized segment of the entire industry. Since these producers are numerous enough to keep up a volume of fluid milk for New York distribution beyond ordinary requirements, cut-throat competition even among them would threaten the quality and in the end the quantity of fluid milk deemed suitable for New York consumption. . . .

Order No. 27. The Secretary of Agriculture found that two-thirds of the milk produced for the New York marketing area actually moves in interstate commerce and that the remaining one-third produced within the State of New York was "physically and inextricably intermingled" with the interstate milk; that all was handled either in the current of interstate commerce or so as to affect, burden and obstruct such interstate commerce in milk and its products. . . . The Secretary further found that prices calculated in accordance with the Agricultural Marketing Agreement Act of 1937 . . . were not reasonable in view of the supplies and prices of feeds and other economic conditions which affect the supply and demand for milk. He then fixed a minimum price for milk to be determined from time to time by formula. . . .

Article IV is important since it establishes minimum prices for milk. . . . For the purposes of this opinion it is sufficient to say, as an example, that the minimum price each handler should pay for milk is fixed by a formula which varies with the butter-price range for 92-score butter at wholesale in the New York market during the 60 days preceding the 25th day of the preceding month. . . . It should be understood, however, that this minimum price is not the amount which the producer receives but the price level or so-called "value" from which is calculated the actual amount in dollars and cents which he is to receive.

By Article VI a uniform price is computed and it is this uniform price which the producer is actually paid by the proprietary (non-coöperative) handlers. The uniform price is determined by a computa-

tion which in substance multiplies the amount of milk received by all handlers, less certain quantities of milk permitted to be deducted, by the minimum prices fixed by Article IV. . . . From the result various payments and reservations are deducted and the remainder is divided by the total quantity of milk received. To equalize, handlers pay into the producer settlement fund. While much over-simplified the operation will be made clear by summarizing the provisions of Article VII to require that handlers shall pay to the producer settlement fund the amount by which their purchased milk multiplied by the minimum prices for the various classes is greater than their purchased milk multiplied by the uniform price. When the handlers' purchased milk multiplied by the minimum prices is less than when it is multiplied by the uniform price, the producer settlement fund pays them the difference for distribution to their producers. These provisions give uniform prices to all producers. . . .

II. Constitutionality of the Act.

A. *Minimum prices.* The challenge is to the regulation "of the price to be paid upon the sale by a dairy farmer who delivers his milk to some country plant." It is urged that the sale, a local transaction, is fully completed before any interstate commerce begins and that the attempt to fix the price or other elements of that incident violates the Tenth Amendment. But where commodities are bought for use beyond state lines, the sale is a part of interstate commerce. We have likewise held that where sales for interstate transportation were commingled with intrastate transactions, the existence of the local activity did not interfere with the Federal power to regulate inspection of the whole. Activities conducted within state lines do not by this fact alone escape the sweep of the Commerce Clause. Interstate commerce may be dependent upon them. Power to establish quotas for interstate marketing gives power to name quotas for that which is to be left within the state of production. Where local and foreign milk alike are drawn into a general plan for protecting the interstate commerce in the commodity from the interferences, burdens and obstructions, arising from excessive surplus and the social and sanitary evils of low values, the power of the Congress extends also to the local sales.

This power over commerce when it exists is complete and perfect. It has been exercised to fix a wage scale for a limited period, railroad tariffs and fees and charges for live-stock exchanges.

The authority of the Federal government over interstate commerce does not differ in extent or character from that retained by the states over intrastate commerce. Since *Munn v. Illinois*, this Court has had

occasion repeatedly to give consideration to the action of states in regulating prices. Recently, upon a reëxamination of the grounds of state power over prices, that power was phrased by this Court to mean that "upon proper occasion and by appropriate measures the state may regulate a business in any of its aspects, including the prices to be charged for the products or commodities it sells." [*Nebbia v. New York*, 291 U.S. 502, 537.]

The power of a state to fix the price of milk has been adjudicated by this Court. [*Id.*] A thorough exposition of the milk situation in the New York shed was made in the *Nebbia* case. There is nothing to add to what was there said, save to point out that since that decision, we have held that a state cannot prohibit the sale of imported milk where the extra-state purchase price was below the prescribed minimum [*Baldwin v. Seelig*, 294 U.S. 511] and that a Pennsylvania regulatory law, including minimum prices, applied in the absence of Federal regulation to milk purchased in Pennsylvania for shipment into the New York marketing area [*Milk Control Board v. Eisenberg Farm Products*, No. 426 this term; February 27, 1939.]

B. Equalization Pool. In order to equalize the prices received by producers, handlers are required to clear their purchases through the producer settlement fund. Payments into and withdrawals from this fund depend upon the "value" of the milk received which is fixed by the Order at different prices governed by the use made by the handler of the purchased milk and upon whether his obligations to producers are greater or less than the uniform price due the producers under the scheme. The result of the use of the device of an equalization pool is that each producer, dealing with a proprietary handler, gets a uniform or weighted average price for his milk, with differentials of quality, location or other usual market variations, irrespective of the manner of its use. . . .

The defendants' objection to the equalization pool, here considered, is not to the disbursements from the fund for expenses of standby or marketing services. It is to the alleged deprivation of liberty and property accomplished by the pooling requirement in taking away from the defendants their right to acquire milk from their patrons at the minimum class price, according to its use, and forcing the handlers to pay their surplus, over the uniform price, to the equalization pool instead of to their patrons. This argument assumes the validity of price regulation, as such, but denies the constitutionality of the pooling arrangement because handlers are not at liberty to pay the producer in accordance with the use of the producer's milk but must distribute the surplus to others whose milk was resold less advantageously. It is urged that to carry this principle of contribution to its logical conclusion

would mean that the wages of the employed should be shared with the unemployed; the highly paid, with the underpaid and the receipts of the able, the fortunate and the diligent, with the incompetent, the unlucky and the drone.

No such exaggerated equalization of wealth and opportunity is proposed. The pool is only a device reasonably adapted to allow regulation of the interstate market upon terms which minimize the results of the restrictions. It is ancillary to the price regulation, designed, as is the price provision, to foster, protect and encourage interstate commerce by smoothing out the difficulties of the surplus and cut-throat competition which burdened this marketing. In *Mulford v. Smith*, [No. 505 this term, decided April 17, 1939,] we made it clear that volume of commodity movement might be controlled or discouraged. As the Congress would have, clearly, the right to permit only limited amounts of milk to move in interstate commerce, we are of the opinion it might permit the movement on terms of pool settlement here provided.

Common funds for equalizing risks are not unknown and have not been considered violative of due process. The pooling principle was upheld in workmen's compensation, bank deposit insurance, and distribution of benefits in the Transportation Act.

The defendants rely particularly upon *Thompson v. Consolidated Gas Utilities Corp.*, [300 U.S. 55, 77, 78,] and *Railroad Retirement Board v. Alton*, [295 U.S. 330, 355 *et seq.*] In the *Thompson* case, the Texas Railroad Commission ordered proration of gas production in the Panhandle. It was assumed that proration to prevent waste and protect correlative right in a pool was valid but it was held that the proration order in issue was for none of these purposes. It was for the "sole purpose . . . to compel those [with market outlets] . . . to purchase gas from potential producers" who have no market. This was not deemed to be reasonably related to the conservation of gas or the protection of correlative rights. In the *Retirement Board* case, the pooling principle was involved but was found to be invalid because the burdens on the roads were not equalized with the benefits. Entry on service was made at different age levels for different roads. Employees seventy or older were required to retire. Some roads had none. Solvent and insolvent roads were liable alike. All carriers were treated as a single employer. It was these provisions, deemed unequal, which led to the conclusion that the manner of pooling of funds denied due process. In this case, the pooling has differentials to cover the variations of quality and location.

C. *Delegation*. There are three issues of delegation presented: (1) the delegation of authority to the Secretary of Agriculture to establish marketing areas; (2) the delegation of authority to producers to ap-

prove a marketing order without an agreement of handlers; and (3) the delegation of authority to coöperatives to cast the votes of producer patrons.

From the earliest days the Congress has been compelled to leave to the administrative officers of the Government authority to determine facts which were to put legislation into effect and the details of regulations which would implement the more general enactments. It is well settled, therefore, that it is no argument against the constitutionality of an act to say that it delegates broad powers to executives to determine the details of any legislative scheme. This necessary authority has never been denied. In dealing with legislation involving questions of economic adjustment, each enactment must be considered to determine whether it states the purpose which the Congress seeks to accomplish and the standards by which that purpose is to be worked out with sufficient exactness to enable those affected to understand these limits. Within these tests the Congress needs specify only so far as is reasonably practicable. The present Act, we believe, satisfies these tests.

1. *Delegation to the Secretary of Agriculture.* . . . Unlike the language of the National Industrial Recovery Act condemned in the *Schechter* case, page 538, the tests here to determine the purpose and the powers dependent upon that conclusion are defined. In the Recovery Act the Declaration of Policy was couched in most general terms. In this Act it is to restore parity prices, Section 2. Under the Recovery Act, general welfare might be sought through codes of any industry, formulated to express standards of fair competition for the businesses covered. Here the terms of orders are limited to the specific provisions, minutely set out in 8c(5) and (7). . . .

The Secretary is not permitted freedom of choice as to the commodities which he may attempt to aid by an order. The Act, Section 8c(2), limits him to milk, fresh fruits except apples, tobacco, fresh vegetables, soybeans and naval stores. The Act authorizes a marketing agreement and order to be issued for such production or marketing regions or areas as are practicable. A city milkshed seems homogeneous. This standard of practicality is a limit on the power to issue orders. It determines when an order may be promulgated.

It is further to be observed that the Order could not be and was not issued until after the hearing and findings as required by Section 8c(4). . . . A right by statute is given handlers to object to the Secretary to any provision of an order as not "in accordance with law," with the privilege of appeal to the courts. Section 8c(15) (A) and (B). Even though procedural safeguards cannot validate an unconstitutional delegation, they do furnish protection against an arbitrary use of properly delegated authority.

A further provision of the Act is to be noted as it was employed as a standard to determine the minimum price. This is Section 8c(18). Acting under this section, the Secretary fixed a fluctuating minimum price based upon wholesale butter prices in New York. While it is true that the determination of price under this section has a less definite standard than the parity tests of Sections 2 and 8e, we cannot say that it is beyond the power of the Congress to leave this determination to a designated administrator, with the standards named. The Secretary must have first determined the prices in accordance with Section 2 and Section 8e, that is, the prices that will give the commodity a purchasing power equivalent to that of the base period, considering the price and supply of feed and other pertinent economic conditions affecting the milk market in the area. If he finds the price so determined unreasonable, it is to be fixed at a level which will reflect such factors, provide adequate quantities of wholesome milk and be in the public interest. This price cannot be determined by mathematical formula but the standards give ample indications of the various factors to be considered by the Secretary.

2. *Delegation to Producers.* The objection is made that this is an unlawful delegation to producers of the legislative power to put an order into effect in a market. In considering this question, we must assume that the Congress had the power to put this Order into effect without the approval of anyone. Whether producer approval by election is necessary or not, a question we reserve, a requirement of such approval would not be an invalid delegation.

3. *Authorization of Coöperatives to Cast the Votes of Producer Patrons.* This objection, too, falls before the answering argument that inasmuch as Congress could place the Order in effect without any vote, it is permissible for it to provide for approval or disapproval in such way or manner as it may choose.

4. *Coöperatives in the Equalization Fund.* . . . The orders are to be applicable to "processors, associations of producers, and others engaged in the handling" of commodities. The reports on the bill show no effort to differentiate. Neither do the debates in Congress. The statutory provisions for equalization of the burdens of surplus would be rendered nugatory by the exception of "agency" cooperatives. The administrative construction has been to include such organizations as handlers. With this we agree. As here used the word "purchased" means "acquired for marketing."

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS concur. . . .

MR. JUSTICE McREYNOLDS and MR. JUSTICE BUTLER, dissenting. . . .

MR. JUSTICE ROBERTS, dissenting. . . .

I am of opinion that Order No. 27 is not authorized by the Act, but if it is authorized, deprives the appellees of their property without due process of law in violation of the Fifth Amendment.

. . . . The coöperative associations which are handlers are not required to make payment for similar milk at the uniform price or at any stated price. . . . Handlers selling milk received from producers in the production area, but marketed outside the marketing area, (denominated "unpriced milk") are not required to pay a uniform price for such milk and the actual market value of such milk, or any fixed amount in respect thereof. They are permitted to blend prices paid or purported to have been paid for unpriced milk with the uniform price announced by the Administrator for milk sold in the marketing area in competition with other handlers who sell milk only in that area. . . .

It is evident from the terms of the order, and the Secretary's construction of it, that handlers who use "unpriced" milk may fix any price they choose to fix for it. Thus, contrary to the requirement of Section 8c(5)(A), of the statute, all producers do not receive a uniform price for milk. This is a necessary effect of the provision permitting the blending of the price paid producers for milk sold in the marketing area and an arbitrary price fixed for "unpriced" milk. The effect upon a handler whose trade is solely in the marketing area is disastrous. The lower price paid by those who are permitted to blend makes it possible for them to resell the milk in the marketing area, in which no resale price is fixed, at a cut rate which is destructive of their competitors' business. . . .

The appellants make no answer to the appellees' attack on this feature of the order. The opinion of this court states that the detriment to the smaller handlers who sell milk for use only in the marketing area is the result of competitive conditions which the order does not affect. But it is evident that the order freezes the minimum price which is to be paid by many handlers and leaves the price of other handlers who compete with them open to reduction by the device of blending. . . .

THE CHIEF JUSTICE joins in this opinion so far as it relates to the invalidity of the order on the ground stated; MR. JUSTICE McREYNOLDS and MR. JUSTICE BUTLER also join in this opinion.

MULFORD V. SMITH.

Supreme Court of the United States. 1939.
307 U.S. 38.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

The appellants, producers of flue-cured tobacco, assert that the Agricultural Adjustment Act of 1938, is unconstitutional as it affects their 1938 crop.

The portions of the statute involved are those included in Title III, providing marketing quotas for flue-cured tobacco. The Act directs that when the supply is found to exceed the level defined in the Act as the "reserve supply level" a national marketing quota shall become effective which will permit enough flue-cured tobacco to be marketed during the ensuing marketing year to maintain the supply at the reserve supply level. The quota is to be apportioned to the farms on which tobacco is grown. Penalties are to be paid by tobacco auction warehousemen for marketing tobacco from a farm in excess of its quota.

Section 311 is a finding by the Congress that the marketing of tobacco is a basic industry which directly affects interstate and foreign commerce; that stable conditions in such marketing are necessary to the general welfare; . . . that without federal assistance the farmers are unable to bring about orderly marketing. . . .

Within thirty days after proclamation [of the national marketing quota] the Secretary [of Agriculture] is to conduct a referendum of the producers of the crop of the preceding year to ascertain whether they favor or oppose the imposition of a quota. If more than one-third oppose, the Secretary is to proclaim the result before January 1st and the quota is not to be effective.

By # 313 (a) it is directed that the quota is to be first apportioned among the states based on the total quantity of tobacco produced in each state during the five years immediately preceding the year in question, plus the normal production of any acreage diverted under any agricultural adjustment and conservation program in any of the years. The basic determination is to be adjusted to correct state allotments, giving due consideration to seed bed or other plant diseases, production trends, or abnormal producing conditions which affected production in the several states during the five year period. . . .

Apportionment of the quota amongst individual farms is to be by local committees of farmers according to standards prescribed by the Act, amplified by regulations and instructions issued by the Secre-

tary. . . . If the farmer is dissatisfied with his allotment he may have his quota reviewed by a local review committee, and, if dissatisfied with the determination of that committee, he may obtain judicial review.

Section 314 provides that if tobacco in excess of the quota for the farm on which the tobacco is produced is marketed through a warehouseman, the latter must pay to the Secretary a penalty equal to fifty per cent. of the market price of the excess, and may deduct an amount equivalent to the penalty from the price paid the producer. . . .

A few days before the 1938 auction sales were to take place, the appellants, who produce flue-cured tobacco in southern Georgia and northern Florida, filed a bill in equity in a Georgia state court against local warehousemen to restrain them from deducting penalties under the Act from the sales price of tobacco to be sold at their auction warehouses on behalf of appellants. . . . The court granted a preliminary injunction. . . . The case was removed to the United States District Court for the Middle District of Georgia. The District Court continued the injunction. . . . The United States was permitted to intervene as defendant. . . .

The appellants plant themselves upon three propositions: (1) that the Act is a statutory plan to control agricultural production and, therefore, beyond the powers delegated to Congress; (2) that the standard for calculating farm quotas is uncertain, . . . resulting in an unconstitutional delegation of legislative power to the Secretary; (3) that . . . the Act takes their property without due process of law.

First. The statute does not purport to control production. It sets no limit upon the acreage which may be planted or produced and imposes no penalty for the planting and producing of tobacco in excess of the marketing quota. It purports to be solely a regulation of interstate commerce, which it reaches and affects at the throat where tobacco enters the stream of commerce,—the marketing warehouse. The record discloses that at least two-thirds of all flue-cured tobacco sold at auction warehouses is sold for immediate shipment to an interstate or foreign destination. In Georgia nearly one hundred per cent of the tobacco so sold is purchased by extra-state purchasers. In markets where tobacco is sold to both interstate and intrastate purchasers it is not known, when the grower places his tobacco on the warehouse floor for sale, whether it is destined for interstate or intrastate commerce. Regulation to be effective must, and therefore may constitutionally, apply to all sales. This court has recently declared that sales of tobacco by growers through warehousemen to purchasers for removal outside the state constitute interstate commerce. *Curran v. Wallace*, 306 U.S. 1. Any rule, such as that embodied in the Act, which is intended to foster, protect and conserve that commerce, or to prevent the flow of commerce from

working harm to the people of the nation, is within the competence of Congress. Within these limits the exercise of the power, the grant being unlimited in its terms, may lawfully extend to the absolute prohibition of such commerce, and *a fortiori* to limitation of the amount of a given commodity which may be transported in such commerce. The motive of Congress in exerting the power is irrelevant to the validity of the legislation.

The provisions of the Act under review constitute a regulation of interstate and foreign commerce within the competency of Congress under the power delegated to it by the Constitution.

Second. . . . What has been said in summarizing the provisions of the Act sufficiently discloses that definite standards are laid down . . . in fixing the quota and . . . in its allotment amongst states and farms. . . .

Third. . . . Prior to the receipt of notice each of them had largely, if not wholly, completed planting, cultivating, harvesting, curing and grading his tobacco. Until receipt of notice none knew, or could have known, the exact amount of his quota, although, at the time of filing the bill, each had concluded from available information that he would probably market tobacco in excess of any quota for his farm. . . .

On the basis of these facts it is argued that the statute operated retroactively and therefore amounted to a taking of appellants' property without due process. The argument overlooks the circumstance that the statute operates not on farm production, as the appellants insist, but upon the marketing of their tobacco in interstate commerce. . . . The Act did not prevent any producer from holding over the excess tobacco produced, or processing and storing it for sale in a later year; and the circumstance that the producers in Georgia and Florida had not provided facilities for these purposes is not of legal significance.

MR. JUSTICE BUTLER, dissenting. . . .

In *United States v. Butler*, 297 U.S. 1, we held the federal government without power to control farm production. . . . Mere inspection of the statute and Secretary's regulations unmistakably discloses purpose to raise price by lessening production. . . . It is wholly fallacious to say that the penalty is not imposed upon production. The farmer raises tobacco only for sale. Punishment for selling is the exact equivalent of punishment for raising the tobacco. . . .

MR. JUSTICE McREYNOLDS concurs in this opinion.

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